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No.

In The

Supreme Court of the United States

October Term, 1993

EDDY LANKFORD,

Petitioner,

vs.

JANE DOE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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150 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether a public employee may be deemed to be acting "under color of state law" for purposes of 42 U.S.C. § 1983 when the alleged constitutional violation in question involves misconduct (here, physical sexual abuse of a student by a teacher) which is entirely outside the grant of any authority by the state and beyond the course and scope of the individual's employment.

II. Whether a supervisory official (here, a school principal) may be held liable under 42 U.S.C. § 1983 for the unconstitutional acts of a subordinate on the basis of mere inaction, and in the absence of any affirmative conduct, condonation or authorization on the part of the official.

III. Whether a supervisory official may be held liable under 42 U.S.C. § 1983 for the unconstitutional acts of a subordinate, based upon a "deliberate indifference" standard, in the absence of actual knowledge on the part of the official that any such constitutional violations had previously occurred.

IV. Whether a constitutional right or basis for liability may be deemed "clearly established" for purposes of denying qualified immunity under 42 U.S.C. § 1983 when there was no authority on point at the time the cause of action arose.

NOTE: Petitioner reserves the right to argue Question V in the event that certiorari is granted on any of the questions above, but does not include Question V among the reasons for the grant of certiorari.

V. Whether Petitioner was entitled to summary judgment on the grounds of qualified immunity, in this case.

PARTIES TO THE PROCEEDINGS

Petitioner, Eddy Lankford, is one of the defendants in the underlying civil rights litigation pending in the United States District Court for the Western District of Texas, Austin Division, and was one of the appellants in the Fifth Circuit appeal from which this Petition for Writ of Certiorari arises.

Respondent, Jane Doe, is the plaintiff in the underlying litigation and was the appellee in the Fifth Circuit appeal from which this Petition for Writ of Certiorari arises.

Parties to the Proceedings Below:

(1) Jane Doe, Plaintiff

(2) Lynn Stroud, Defendant

(3) Taylor Independent School District, Defendant

(4) Mike Caplinger, Defendant

(5) Eddy Lankford, Defendant

Amici Curiae in the Proceedings Below:

(1) National School Boards Association

(2) Texas Association of School Boards

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PETITION FOR WRIT OF CERTIORARI

Petitioner Eddy Lankford ("Lankford") respectfully prays that a writ of certiorari issue to review the en banc judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered March 3, 1994, affirming the denial of Petitioner's Motion for Summary Judgment on qualified immunity grounds by the United States District Court for the Western District of Texas.

OPINION BELOW

The en banc Opinion of the Fifth Circuit Court of Appeals,

affirming the denial of Petitioner's Motion for Summary Judgment, is reported at 15 F.3d 443 (5th Cir. 1994) and is reprinted as Appendix A hereto.[1] The Judgment of the Circuit Court is reprinted as Appendix B hereto. The Opinion of the District Court for the Western District of Texas is unreported and is reprinted as Appendix C hereto.

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari seeks review of the March 3, 1994 en banc decision of the Fifth Circuit Court of Appeals wherein the court affirmed the denial of Petitioner's Motion for Summary Judgment on qualified immunity grounds. Jurisdiction over this petition is conferred by 28 U.S.C. § 1254.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983:

> Every person who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

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1. The Fifth Circuit's panel decision, which was vacated by the court en banc, is reported at 975 F.2d 137 (5th Cir. 1992).

U.S. Const. amend. XIV § 1:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arises out of an unfortunate set of circumstances involving inappropriate sexual conduct between a public school teacher, Lynn Stroud ("Stroud"), and one of his students, Respondent Jane Doe. The relationship between Stroud and Respondent began in the fall semester of the 1986-87 school year, when Respondent was a ninth grade student at Taylor High School, in the Taylor Independent School District (the "School District"). The relationship was, at first, a flirtatious one, but with increasing pressure from Stroud it turned sexual, with the first incident of sexual intercourse taking place in Stroud's home in March or April, 1987, when Respondent was fifteen years of age. Thereafter, a series of sexual encounters occurred through the summer months and into the fall semester of the 1987-88 school year, in Stroud's home, in the school fieldhouse at night or on weekends, and on deserted country roads during the middle of the night.

During the spring of 1987, in response to rumors and complaints from others about a suspected relationship between Respondent and Stroud, Petitioner Lankford, Principal of Taylor High School, met with the Stroud on two occasions to discuss the matter. Each time Stroud strongly denied any form of misconduct. Then, in the summer of 1987, Respondent's parents presented school officials with two endearing notes from Stroud to Respondent that they had found in their daughter's possession. At

that time, Mike Caplinger, the Superintendent of Schools, and Lankford interrogated Stroud at length, and he again adamantly denied the existence of a physical or otherwise inappropriate relationship between himself and Respondent. Likewise, Respondent was interviewed by Superintendent Caplinger, and she denied the existence of any such relationship with equal vigor, despite Caplinger's assurances that he would do everything he could to assist her, including going to the police, if Stroud was harming her in anyway. Faced with such denials from the parties themselves, Caplinger concluded that he did not have sufficient evidence to bring Stroud before the school board for a discharge hearing. Instead, he warned Stroud not to communicate with Respondent in any way, and that he would be discharged if there was any form of inappropriate relationship between the two.

Thereafter, in the fall of 1987, Respondent's parents found additional correspondence from Stroud in her possession and, through a family attorney, Respondent came forward and revealed her true relationship with Stroud for the first time. Simultaneously, another student complained to school officials that Stroud had made unwelcome sexual advances towards her. Stroud was then suspended by Superintendent Caplinger, resigned, and pled guilty to criminal charges arising from his relationship with Respondent.

Respondent subsequently filed suit against the School District, Stroud, Caplinger, and Lankford in state district court, which was removed to federal court. As amended, Respondent's complaint alleged a claim against all of the Defendants under 42 U.S.C. § 1983; a claim against the School District only under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681; and pendent state law claims against Stroud only. In her Section 1983 claim, Respondent alleged that all of the Defendants "deprived Plaintiff of her right to be free from bodily harm and sexual abuse in violation of the due process and equal protection clauses of the Fourteenth Amendment." In addition, Respondent distinguished between the conduct of Defendants by alleging that:

> 34. Defendant Stroud acted intentionally, willfully, knowingly and purposefully, with the specific intent of depriving Plaintiff of her Fourteenth Amendment rights.
>
> 35. Defendants Lankford, Caplinger, and Taylor ISD were grossly negligent in their supervision of Defendant Stroud and in their failure to seriously investigate, monitor, or otherwise respond to allegations of wrongdoing by Defendant Stroud when these Defendants had actual and/or constructive knowledge of Stroud's behavior

Record on Appeal, Volume II, p. 583.

Lankford and Caplinger, having been sued in both their individual and official capacities, moved for summary judgment on the basis of their qualified immunity from suit. In their motion, the principal and superintendent argued that they were entitled to qualified immunity as to Respondent's Section 1983 claims since Respondent was not deprived of any clearly established constitutional right and that, in any event, their conduct was objectively reasonable under the circumstances.

The district court rejected Lankford and Caplinger's arguments and denied their motion for summary judgment. *See* Appendix C. Lankford and Caplinger then appealed the denial of their motion to the Fifth Circuit Court of Appeals. In its panel opinion, the Fifth Circuit affirmed the district court's decision and remanded the case for trial on the merits. *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137 (5th Cir. 1992). The panel held that public school students — like Respondent — enjoy a "firmly established constitutional right under the due process and equal protection clauses of the Fourteenth Amendment to be free from sexual

molestation by a state-employed school teacher." *Id.* at 138. In addition, the panel held that Caplinger and Lankford "had an affirmative, constitutionally-based duty to protect [Respondent] from such an intrusion into her bodily integrity," arising from the Texas compulsory school attendance law. *Id.*

Caplinger and Lankford then filed a Petition for Writ of Certiorari with this Court seeking review of the panel opinion, which was denied. *Caplinger v. Doe*, __U.S.__, 113 S. Ct. 1066 (1993). Following the denial of writ, but prior to the issuance of mandate to the District Court, the Fifth Circuit, on its own motion, ordered that the case be reheard en banc, thereby vacating the panel opinion. *Doe v. Taylor Indep. Sch. Dist*, 987 F.2d 231 (5th Cir. 1993). The case was reargued before the Fifth Circuit, en banc, on May 24, 1993, and the opinion which is the subject of this Petition for Writ of Certiorari followed. *See* Appendix A, 1a.

In an 8-6 decision, a majority of the Fifth Circuit held first, that schoolchildren have a Fourteenth Amendment liberty interest to be free from physical sexual abuse by school employees. App. A, 2a. Next, while facially rejecting the notion that school officials have an affirmative constitutional duty to protect schoolchildren from such abuse, as the panel held, the majority nevertheless concluded that school officials "can be held liable for supervisory failures that result in the molestation of a schoolchild if those failures manifest a deliberate indifference to the constitutional rights of that child." App. A, 2a. The majority then adopted the following three-part test to determine whether a supervisory school official, *by action or inaction,* can be held personally liable under 42 U.S.C. § 1983 for physical sexual abuse of a student by a subordinate:

> (1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the

> conclusion that the subordinate was sexually abusing the student;
>
> (2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and
>
> (3) such failure caused a constitutional injury to the student.

App. A, 23a.

Turning to the issue of qualified immunity, the majority concluded that both the constitutional right of public school students to be free from physical sexual abuse by a school employee, and the corresponding duty of supervisory officials to not act with deliberate indifference towards that right, were clearly established in 1987, at the time Respondent's cause of action arose. App. A, 23a-27a. Applying its three-part test to the summary judgment evidence, the majority then determined that Superintendent Caplinger was entitled to summary judgment, thereby reversing the District Court judgment as to Caplinger. App. A, 33a. The majority distinguished Lankford's fact situation from Caplinger's, however, and affirmed the denial of summary judgment for the principal. According to the majority, Lankford knew more and did less, thus creating fact issues which precluded summary disposition. App. A, 27a-31a.

Significantly, the six dissenters (concurring in part, and dissenting in part) agreed with the majority that Caplinger was entitled to summary judgment — but for different reasons. App. A, 49a-72a (J. Garwood, dissenting); 73a-83a (J. Jones dissenting); and 84a-105a (J. Garza, dissenting). In the dissenters' view, *both* school officials were entitled to summary judgment because: (1)

even if Respondent had a constitutional right to be free from physical sexual abuse by Stroud, he was not acting under color of state law at the time of his misconduct, thereby failing to trigger any Section 1983 liability on the part of the school officials; (2) the majority's three-part test for supervisory liability is fatally flawed in that it would affix liability on the basis of mere inaction by a supervisory official, without any actual knowledge of unconstitutional acts being committed by the subordinate; and (3) neither the constitutional right nor basis for supervisory liability articulated by the majority were clearly established.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's panel opinion in *Doe v. Taylor Independent School District* was a significant catalyst in the explosion of sexual abuse litigation that has been brought against public schools and school officials throughout the country. By taking the unusual step of granting rehearing en banc, sua sponte, following this Court's denial of writ as to the panel opinion, the circuit court evidenced its understanding of the important issues raised, and sought to articulate, in as detailed and reasoned a manner as possible, the contours of liability that it believed should exist. In so doing, however, the court blazed still newer trails of even broader constitutional dimensions, that transcend the area of sexual abuse of students.

Indeed, the majority's view of the "color of law" requirement under Section 1983, the basis of a supervisory official's liability for unconstitutional acts of a subordinate, and the circumstances under which a right or duty may be deemed "clearly established" for qualified immunity purposes, has broad ranging implications, not simply for public school officials, but for public officials of every stripe. As summarized below, and as the six dissenters in three separate dissenting opinions recognized, "special and important reasons" exist for a grant of writ of certiorari in this case

under Rules 10.1(a) and (c) of the Supreme Court Rules. Perhaps Judge Jones stated it best: "[i]f Doe has a viable constitutional claim, I say, let the Supreme Court say so."[2] App. A, 83a (J. Jones, dissenting). *Doe v. Taylor Independent School District* is now clearly ripe for this Court's review.

I.

THE FIFTH CIRCUIT'S EN BANC DECISION THAT A PUBLIC EMPLOYEE CAN BE ACTING "UNDER COLOR OF STATE LAW" FOR PURPOSES OF 42 U.S.C. § 1983 EVEN WHEN HIS ALLEGEDLY UNCONSTITUTIONAL CONDUCT IS OUTSIDE THE GRANT OF ANY AUTHORITY BY THE STATE AND BEYOND THE COURSE AND SCOPE OF HIS EMPLOYMENT, CONFLICTS WITH DECISIONS OF THIS COURT AND THE DECISION OF THE TENTH CIRCUIT IN *D.T. BY M.T. v. INDEPENDENT SCHOOL DISTRICT NO. 16.*

Assuming *arguendo* that in 1987 it was clearly established that school children had a liberty interest protecting them from physical sexual abuse by a school employee, *see* Section IV, pp. 22-27, *infra*, before Lankford can be held liable for an alleged failure to supervise Stroud, it must be shown that Stroud's sexual abuse of Respondent was done "under color of state law." *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1066 (1992). For the "color of law" requirement to be met, Stroud's actions must have been "fairly attributable to the state." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

The majority concluded that Stroud's physical sexual abuse

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2. And *see*, App. A, 72a n. 24 (J. Garwood, dissenting) ("The majority has no power to overrule *Rizzo*, that right being reserved to the Supreme Court").

of Respondent, which occurred outside of school hours or any school related activity, was nevertheless done under color of state law because the relationship between the teacher and the student had its genesis in the school environment. App. A, 17a n. 4. The majority's analysis is in conflict with this Court's decisions outlining the parameters of state action,[3] as well as the decision of the Tenth Circuit in *D.T. by M.T. v. Independent School District No. 16*, 894 F.2d 1176 (10th Cir.), *cert. denied*, 498 U.S. 879 (1990).

It is fundamental that in order for a public employee to engage in state action, he must be acting under some form of state granted authority.[4] Thus, while state action may occur where an official acts pursuant to authority but exceeds it, the same is not true where

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3. "[I]n a Section 1983 action brought against a state official, the statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

4. *See Monroe v. Pape*, 365 U.S. 167, 187 (1961), *rev'd on other grounds sub nom., Monell v. Dept. of Social Serv. of City of N.Y.*, 436 U.S. 658 (1978) (holding that police officers acted under color of state law by abusing authority granted them by the state to effect searches and seizures); *United States v. Raines*, 362 U.S. 17, 24-25 (1960) (holding that Georgia County Board of Registrar's discrimination against African-American who sought to vote constituted state action because discrimination occurred within the course of their official duties); *Screws v. United States*, 325 U.S. 91, 107-08 (1945) (holding that Georgia sheriff, policeman, and special deputy acted under color of state law when they abused arrest power to beat young African-American to death); *United States v. Classic*, 313 U.S. 299, 326 (1945) (holding that election officials, who were required by state law to count ballots, record ballot count, and certify election results, acted under color of state law when they misused such authority to alter and falsely count ballots in federal primary election); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 294 (1913) (holding that City of Los Angeles, operating under authority of municipal ordinance, acted under color of state law when it set rates for telephone services at confiscatory levels).

no authority exists and the misconduct is expressly forbidden.[5]

According to the majority, Stroud's authority for state action purposes emanated from his position as a public school teacher. App. A, 17a n. 4; *see also* 40a-41a (J. Higginbotham, dissenting). As Judge Garza noted, however:

> . . . [T]he state, by authorizing Stroud to teach students, did not give him the authority to violate state criminal law by sexually abusing his students. Accordingly, it is only in the sense that Stroud had no grant of authority to sexually abuse Doe that one can suggest or argue that Stroud misused or abused his position as a teacher. Consequently, Stroud, bent upon violating state criminal law, did not act under color of state law when doing so.

App. A, 101a-102a (J. Garza, dissenting).[6]

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5. *See Lugar*, 457 U.S. at 940 (holding that the plaintiff had not stated a cause of action under § 1983 because "the conduct of which [plaintiff] complained could not be ascribed to any governmental decision; rather [defendants] were acting contrary to the relevant policy articulated by the state" . . . and did not "have the weight of the state behind their private decision . . . ."); *Barney v. City of New York*, 193 U.S. 430 (1904) (holding that tunnel construction was not state action within intent and meaning of the 14th Amendment when the same was not only not authorized but forbidden by state legislation); *Snowden v. Hughes*, 321 U.S. 1 (1944) (J. Frankfurter, concurring) (Illinois Primary Canvassing Board's refusal to file certificate listing plaintiff as candidate for seat in state assembly did not constitute state action where such inaction violated state law).

6. As Judge Garza further reasoned:

> The fatal flaw in the majority's analysis can be shown with one hypothetical: assume that a teacher shoots a student for not turning in his or her homework.

(Cont'd)

Assuming *arguendo*, that a school teacher could ever be acting under color of law when sexually abusing a student, reasonable parameters must still exist to bring such conduct within the fold of state action. Logically, a teacher could be said to be acting under color of law if the sexual abuse occurs during school time or in connection with a school sponsored activity, or if sexual conduct is solicited as the *quid pro quo* for more favorable academic treatment. Under the majority's analysis, however, if the relationship commences as that of teacher-student, the misconduct that follows is, ipso facto, state action — a result which would effectively undermine the color of law requirement of Section 1983 and hold public school officials responsible for the private lives of school employees and students, all day, every day, year round.[7]

(Cont'd)

> Following the majority's approach, there exists a "real nexus" between the activity out of which the violation—i.e., the shooting—occurred and the teacher's duties and obligations as a teacher. Thus, the teacher acted under color of state law, and the student may bring a § 1983 action. Consequently, the majority essentially raises to the level of a constitutional violation all torts committed by teachers against students.

App. A, 102a n. 23 (J. Garza, dissenting).

7. The physical sexual abuse principally relied on by the majority here is the sexual intercourse, and this not only was all consensual, but also took place clearly outside of school hours and not as even a purported part of any school activity. The same is true of the "sexually fondling" or "heavy petting and undressing." None of any of this could be said to even colorably be within the course or scope of Stroud's employment. Nor was Doe's participation in this sexual activity some sort of "*quid pro quo*" for scholastic or other official favors from Stroud . . . .

App. A, 54a - 55a (J. Garwood, dissenting).

The Fifth Circuit's holding is in conflict with the only circuit that has sought to stake out reasonable "color of law" parameters in a case such as this. In *D.T. by M.T. v. Independent School District No. 16*, the Tenth Circuit rejected the civil rights claims of three male elementary school students who alleged that they had been sexually molested by their fifth grade teacher/coach over summer vacation while participating in fund-raising activities for a summer basketball camp. The Tenth Circuit expressly rejected an argument advanced by the students that the alleged constitutional deprivations were "fairly attributable" to the school district because of the "cloak of authority" held by a teacher:

> If the "extra-curricular" activity had a real "nexus" to the duties and obligations owing by [the teacher] to [the] School District, we would agree with plaintiffs. However, such is simply not the case. Here, the plaintiffs voluntarily participated with [the teacher] in basketball camp fundraising activities which were not related to school activities and thus, not undertaken under color of state law.

Id. at 1188.

Significantly, the Tenth Circuit reached this conclusion despite the fact that the prior teacher-student relationship that existed was undeniably a causative factor in the teacher's ability to molest the students.[8] The court reasoned as follows:

> Acts of a state officer in the ambit of his personal pursuits are not acts under color of state law. *Screws v. United States*, 325 U.S. 91

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8. *See* discussion of undisputed evidence in *D.T. by M.T.*, 894 F.2d at 1182-84; *see also* App. A, 52a n. 4 and 55a-56a n. 9 (J. Garwood, dissenting).

> (1945). A state, its agencies or officials may not be assessed liability for the acts of a private individual, except by a fair attribution of those actions to the state. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1987). It is uncontested in our case that on June 13-14, 1984, [the teacher] was under no obligation to the school district. He was then on his free or summer "vacation." As such, he had no duties or obligations owing to or functions to perform for the school district.

D.T. by M.T., 894 F.2d at 1186.

In its attempt to distinguish *D.T. by M.T.*, the majority relied on facts supporting its conclusion that Stroud exploited his position as a teacher, but failed to subject the Tenth Circuit case to the same analysis. Instead, it summarily dismissed *D.T. by M.T.*, noting that the school in that case made it clear to the teacher who committed the abuse that the fundraising activity during which the abuse occurred was not a school program, but a community volunteer effort. App. A, 17a n. 4. If both cases are subjected to the same analysis, however, their holdings are irreconcilable.[9] As already noted, Stroud's physical sexual abuse of Respondent, which formed the basis of the substantive due process violation found by the majority, did not occur in connection with any school activity, extra-curricular or otherwise. While Stroud's initial advances towards Respondent may have been under color of law, it cannot be said his subsequent acts of depravity were so clothed. To hold otherwise, would be to render the most base, private acts of any public employee towards another "fairly attributable to the

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9. The facts in *D.T. by M.T.* are as egregious as those found here, if not more so. *See D.T. by M.T.*, 894 F.2d at 1178-84. A careful review of the facts in *D.T. by M.T.* would show that if the Tenth Circuit was confronted with the cause of action here, Petitioner Lankford would be granted summary judgment.

state" when the only linkage is the employee's prior, "official" relationship with his victim. *See Lugar*, 457 U.S. at 936-37. Clearly the Constitution requires more.

II.

THE FIFTH CIRCUIT'S EN BANC DECISION THAT A SUPERVISORY OFFICIAL MAY BE HELD LIABLE UNDER 42 U.S.C. § 1983 FOR THE UNCONSTITUTIONAL ACTS OF A SUBORDINATE ON THE BASIS OF MERE INACTION, AND IN THE ABSENCE OF ANY AFFIRMATIVE CONDUCT, CONDONATION OR AUTHORIZATION ON THE PART OF THE OFFICIAL, CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

Having found that public school students have a constitutional right to be free from physical sexual abuse by school employees, the majority then held that school officials can be liable for "supervisory failures" that result in such abuse, if the official, "by action or inaction," demonstrated a deliberate indifference towards a student's constitutional rights. App. A, 22a.

While the majority disclaimed the existence of an affirmative constitutional duty to protect in the school setting given the absence of a "special relationship" as required by this Court in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), it did, in reality, adopt a form of such duty — "an affirmative duty not to fail with deliberate indifference to act." App. A, 57a (J. Garwood, dissenting). Eschewing this Court's holding in *Rizzo v. Goode*, 423 U.S. 362 (1976), the majority specifically held that mere inaction can amount to the deliberate indifference necessary to affix supervisory liability. App. A, 2a. Indeed, the three-part test for supervisory liability devised by the majority "contains no element of affirmative conduct,

communication of condonation or authorization, or the like on the supervisor's part." App. A, 58a (J. Garwood, dissenting). Instead, under the second prong of the majority's test, *failing to act* is the key, *i.e.*, "failing to take action that was obviously necessary to prevent or stop the abuse." App. A, 23a.

While this Court has, in the past, found that fundamental rights emanate from, or are within the penumbra of rights not expressly articulated in the Constitution (particularly privacy rights), it has never ignored the textual constraints embodied in the Fourteenth Amendment's "no action" clause to command the type of affirmative obligations embodied in the majority's three part test.[10] Indeed in *Rizzo*, this Court addressed and rejected the argument that a supervisory public official has an affirmative constitutional duty to supervise and discipline so as to prevent violations of constitutional rights by his or her subordinates. *Rizzo*, 423 U.S. at 376. This Court held that supervisory officials do not violate the constitutional rights of the victims of a subordinate's misconduct unless they have played an "*affirmative*

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10. The majority, apparently recognizing that it is exposing Lankford to liability divorced from any constitutional violation committed by him, notes that the imposition of such liability derives from the language of Section 1983 and not from the violation of any constitutional provision. App. A, 22a n. 8 ("this standard of liability derives from the language of Section 1983, which provides a remedy against anyone who, under color of state law 'causes' another to be subjected to a violation of his or her constitutional rights"). The effect of the majority's distinction is to make Section 1983 a federal tort statute as opposed to a statutory remedy for constitutional violations. Assuming Congress intended to provide additional tort liabilities in Section 1983, "[i]n no reasonable sense of the word 'causes' can Lankford's pure inaction — not amounting to tacit or implied condonation or authorization — be said to have 'caused' Stroud's physical sexual abuse of Doe. As the Supreme Court observed in *Rizzo*, '[s]uch reasoning . . . blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in Section 1983.'" App. A, 71a-72a (J. Garwood, dissenting) (quoting *Rizzo*, 423 U.S. at 376).

part" in that misconduct, even where a pattern of constitutional violations by a subordinate is shown. *Id.* at 377.

The majority's insistence that mere inaction is sufficient to affix supervisory liability, and its refusal to find that *Rizzo* dictates otherwise, is in conflict with the majority of the circuits that have addressed the issue. *See Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3rd Cir. 1989), *cert. denied sub nom., Smith v. Stoneking*, 493 U.S. 1044 (1990) (*Stoneking II*) (holding that school superintendent was entitled to qualified immunity in action brought by former student arising from teacher's alleged sexual misconduct where there were no affirmative acts by superintendent on which to base claim of toleration, condonation or encouragement of sexual harassment by teacher); *Poe v. Haydon*, 853 F.2d 418, 429 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989) (holding that mere inaction does not afford liability under Section 1983 even where a supervisor is actually aware of subordinate's constitutional violations); *Wilson v. City of N. Little Rock*, 801 F.2d 316, 322 (8th Cir. 1986) (holding that Section 1983 liability will not lie against supervisory officials for failing to prevent police misconduct, absent showing of at least tacit authorization); *Lenard v. Argents*, 699 F.2d 874 (7th Cir.), *cert. denied*, 464 U.S. 815 (1983) (holding that at a minimum, plaintiff must show official implicitly authorized, approved, or knowingly acquiesced in unconstitutional conduct of offending officers); *Turpin v. Mailet*, 619 F.2d 196, 201 (2d Cir. 1980), *cert. denied sub nom., Turpin v. City of West Haven*, 449 U.S. 1016 (1980) (holding supervisory officials liable only where there is deliberate indifference or tacit authorization to a pattern of constitutionally offensive acts); *Cook v. City of Price, Carbon Cty., Utah*, 566 F.2d 699, 702 (10th Cir. 1977) (holding that counsel members were not responsible for city clerk's actions absent showing of affirmative link between clerk's actions and those of council members).[11]

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11. The majority's opinion is likewise contrary to prior case law in the Fifth Circuit. *See Reimer v. Smith*, 663 F.2d 1316, 1323 (5th Cir. 1981) ("a

(Cont'd)

The Third Circuit's decision in *Stoneking II* best demonstrates the conflict created by the majority's holding. In *Stoneking II*, a case involving the sexual abuse of a high school student by a band director during school time and school activities, the plaintiff asserted claims of supervisory liability against the principal, assistant principal and superintendent. After reviewing *Rizzo* and its progeny, the circuit court concluded that "the mere failure of supervisory officials to act or investigate cannot be the basis of liability . . ." *Stoneking II*, 882 F.2d at 730. The court held that the principal and assistant principal, who were alleged to have intimidated and chastised students that lodged complaints of sexual abuse against the band director, were not entitled to summary judgment on qualified immunity grounds since such "affirmative conduct" could be viewed as amounting "to a communication of condonation" of the band director's misconduct. *Id.* at 730-31. On the other hand, the court determined that the superintendent was entitled to summary judgment since he engaged in no such affirmative acts, and the claims against him amounted to "mere 'inaction and insensitivity' on his part." *Id.* at 731. Qualified immunity was thus bestowed on the superintendent in *Stoneking II* on the same basis that it was denied to Petitioner Lankford here.[12]

(Cont'd)
supervisory official cannot be held liable merely for failing to adopt policies to prevent Constitutional violations; however, he can be held liable if he affirmatively adopts policies which are wrong or illegal"); *Wanger v. Bonner*, 621 F.2d 675 (5th Cir. 1980) (holding that a supervisory official could not be held liable for failing to adopt policies to prevent Constitutional violations, but could be held liable if he affirmatively adopted policies which were wrongful or illegal and which caused the alleged deprivation of Constitutional rights").

12. Indeed, the majority did not conclude that Stroud's physical sexual abuse of Respondent was the result of any tacit or implied approval of such misconduct on Lankford's part. Under the majority's holding, Lankford's liability is based on non-feasance and nothing more. App. A, 57a-58a (J. Garwood, dissenting).

III.

THE FIFTH CIRCUIT'S EN BANC DECISION THAT A SUPERVISORY OFFICIAL MAY BE HELD LIABLE UNDER 42 U.S.C. § 1983 FOR THE UNCONSTITUTIONAL ACTS OF A SUBORDINATE, BASED UPON A DELIBERATE INDIFFERENCE STANDARD, IN THE ABSENCE OF ACTUAL KNOWLEDGE ON THE PART OF THE OFFICIAL THAT ANY SUCH CONSTITUTIONAL VIOLATIONS HAD PREVIOUSLY OCCURRED, CONFLICTS WITH THE EIGHTH CIRCUIT'S DECISION IN *JANE DOE A. V. SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY.*

The effect of the majority's holding that a supervisory official's inaction alone can amount to deliberate indifference is further aggravated by the diminished knowledge standard it imposes to trigger the duty to act. The first prong of the supervisory liability test devised by the majority, *i.e.*, that the official "learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student," App. A, 23a, coupled with the second prong requirement that he "take action that was obviously necessary to prevent or stop the abuse," *id.*, in effect, creates a negligence standard of liability:[13]

> . . . no one—other than Stroud or Doe—witnessed or otherwise knew of physical sexual abuse of Doe by Stroud or even told Lankford that such was likely occurring. Doe even fooled her parents.

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13. It is fundamental that mere negligence in supervision of subordinates is insufficient to impose liability on supervisory officials under 42 U.S.C. § 1983. *Daniels v. Williams*, 474 U.S. 327, 330-33 (1986).

> The effect of this standard will almost inevitably be to in practice reduce the purported "deliberate indifference" test to one of negligence. If the supervisor — like Lankford here — does not know of the subordinate's physical abuse of the victim, the supervisor may nonetheless be liable if the facts that he did know are ones the Court characterizes as "pointing plainly toward the conclusion that" sexual abuse was occurring. The supervisor, however, — due to inattention or stupidity — may not have drawn that conclusion, but is nevertheless held liable. Such liability is, in essence, liability based on negligence. In the real world of litigation, that is how these cases will be fought out.

App. A, 71a n. 23 (J. Garwood, dissenting).

The first prong of the majority's test is in direct conflict with the holding of the Eighth Circuit in *Jane Doe A. v. Special School District of St. Louis County*, 901 F.2d 642 (8th Cir. 1990). In *Jane Doe A.*, the plaintiffs alleged that the defendant school administrators had violated the plaintiffs' constitutional rights by "fail[ing] to adequately respond to a known risk of physical and emotional harm" presented by a school district bus driver who was later arrested and charged with child abuse. *Id.* at 645. The Eighth Circuit utilized a four-step inquiry to determine whether the individual administrators should be held personally liable for the bus driver's conduct: (1) whether the administrator had "[r]eceived notice of a pattern of unconstitutional acts committed by subordinates;" (2) whether the administrator had "[d]emonstrated deliberate indifference to or tacit authorization of the offensive acts;" (3) whether the administrator "[f]ailed to take sufficient remedial action;" and (4) whether the administrator's failure to

take action "proximately caused injury" to the plaintiffs. *Id.* at 645 (*citing Wilson*, 801 F.2d at 322).

The Fifth Circuit's test for deliberate indifference obviously requires less knowledge to affix supervisory liability than the Eighth Circuit. While the *Jane Doe A.* test requires actual notice of unconstitutional acts by a subordinate, the Fifth Circuit requires only notice of facts or a pattern of behavior which would lead to the conclusion that such unconstitutional acts have occurred.[14] Thus, while the court in *Jane Doe A.* found that reports of misconduct on the part of the bus driver (*e.g.*, kissing students, use of profanity, etc.) were insufficient to constitute notice of a "pattern of unconstitutional acts," *id.* at 646, such reports could have been sufficient to satisfy the Fifth Circuit's lesser knowledge standard. In effect, the Fifth Circuit's test creates the very problem that the Eighth Circuit sought to avoid:

> To hold that the individual defendants and the District are not liable to plaintiffs is not to

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14. The definition given to deliberate indifference in Eighth Amendment prisoners' rights cases reveals an even broader conflict among the circuits. In the most recent case of *Clark v. Armontrout*, __ F.3d __, 1194 W.L. 29736 (8th Cir., May 25, 1994), the Eighth Circuit articulated its approval of a "knew or should have known" standard in the context of prisoners' rights cases, noting that there is a split in the circuits on this point. *Id.* at n. 2. *Compare King v. Fairman*, 997 F.2d 259, 261 (7th Cir. 1993) (requiring actual knowledge) and *Watson v. Canton*, 984 F.2d 537, 540 (1st Cir. 1993) (*accord*), with *Redmond v. County of San Diego*, 942 F.2d 1345, 1443 (9th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 972 (1992) and *Young v. Quinlan*, 960 F.2d 351, 360-61 (3rd Cir. 1992) (*accord*). This very issue is apparently before this Court in *Farmer v. Brennan*, 11 F.3d 668 (7th Cir. 1992), *cert. granted*, __ U.S. __, 114 S. Ct. 56 (1994), in which this Court has been asked to determine if deliberate indifference means disregarding an obvious risk or only a risk that is actually known. Arguably, a lesser knowledge standard is appropriate in *Deshaney*-type cases where an affirmative duty to protect arises, but the same cannot be said of cases in which no custodial or other "special relationship" exists.

> minimize Cerny's misconduct. That subsequent events proved him to be a sexual reprobate, however, should not result in after-the-fact imposition of the requirement of character-discerning omniscience on the part of the individual defendants *or* the District. Viewed in retrospect, some of Cerny's pre-arrest conduct portrays his true nature with a clarity that pre-arrest circumstances at the most only hinted at. If negligence could form the basis for a finding of liability, plaintiffs' showing might have been adequate to take the case to a jury. Measured against the deliberate indifference-official policy standard of liability, however, plaintiffs have failed to establish a submissible case.

Id. at 646-47.

IV.

THE FIFTH CIRCUIT'S EN BANC DECISION THAT THE CONSTITUTIONAL RIGHT AND BASIS FOR SUPERVISORY LIABILITY FOUND WERE "CLEARLY ESTABLISHED" FOR PURPOSES OF DENYING QUALIFIED IMMUNITY UNDER 42 U.S.C. § 1983, WHEN THERE WAS NO AUTHORITY ON POINT AT THE TIME THE CAUSE OF ACTION AROSE, CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

It is fundamental, of course, that a public official, such as Lankford, is entitled to qualified immunity under Section 1983 unless his conduct violated "clearly established" statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This objective test itself, however, has not been applied by the courts

with any real degree of clarity, and the holding of the majority here, unfortunately, only serves to further confuse the issue.

In 1987, it was not clearly established, and indeed it is open to question now, that (1) a public school teacher's consensual sexual relationship with a fifteen year old student, occurring outside of school time and unrelated to any school activity, could be "under color of law" for purposes of affixing constitutional liability, *see* Section I, pp. 9-15, *supra*; (2) a supervisory official could be held liable under Section 1983 for the unconstitutional acts of a subordinate on the basis of mere inaction, and in the absence of any affirmative conduct, condonation or authorization on the part of the official, *see* Section II, pp. 15-18, *supra*; and (3) a supervisory official could be held liable under Section 1983 for the unconstitutional acts of a subordinate, based upon a deliberate indifference standard, in the absence of actual knowledge on the part of the official that any such constitutional violation had previously occurred, *see* Section III, pp. 19-22, *supra*. Indeed, as Judge Jones noted in her dissent, "to assert that these propositions were 'clearly established' in 1987 is an extravagant overstatement." App. A, 75a (J. Jones, dissenting).

The majority engaged in a unique "clearly established" analysis in order to find that Lankford was not entitled to qualified immunity. Most disturbing is the majority's heavy reliance on *Jefferson v. Ysleta Independent School District*, 817 F.2d 303 (5th Cir. 1987), to conclude that the Respondent had a constitutional right to be free from Stroud's molestations, and *Lopez v. Houston Independent School District*, 817 F.2d 351 (5th Cir. 1987), to find that Lankford's mere failure to act could subject him to liability. Both such opinions, while factually inapposite to this case, were also decided after Respondent's cause of action arose.[15]

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5. As noted by Judge Garwood's dissent,

> [t]he majority is similarly in error in denying Lankford

(Cont'd)

Recognizing that *Jefferson* was not on point, the majority, in what Judge Jones described as "tortuously reasoned steps to liability," App. A, 75a (J. Jones, dissenting), applied some form of "shock the conscience" test to conclude that in 1987 Stroud could not reasonably have assumed that it was constitutionally

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(Cont'd)

> qualified immunity on the basis of *Jefferson v. Ysleta ISD*, 817 F.2d 303 (5th Cir. 1987), and *Lopez v. Houston ISD*, 817 F.2d 351 (5th Cir. 1987). The majority holds Lankford may be found liable for failing, between Valentine's Day and late March or early April 1987, to take action so that the Stroud-Doe "relationship might have been derailed at that point." Not only are the cited cases quite inapposite — *Jefferson* involves tying an eight-year old student to her desk all day as school discipline and has no discussion of supervisory (or municipal) liability, and *Lopez* held the supervisors were not liable for the bus driver's wrongful conduct (which in effect imprisoned the student in the bus while the driver knew he was being beaten) — but neither was handed down until late May 1987.

App. A, 68a n. 18 (J. Garwood, dissenting).

Similarly, Judge Jones, upon review of Judge Higginbotham's concurrence, noted that reliance on corporal punishment cases is improper:

> Judge Higginbotham's concurrence suggests that Doe's "fundamental right" stems *a fortiori* from the Supreme Court's decision in *Ingraham v. Wright*, which held that Fourteenth Amendment liberty interests are implicated by the decision of school authorities to inflict corporal punishment on a student . . . . With all due respect, it is a long step from deciding the procedural attributes of corporal punishment to enunciating a right to "freedom of bodily integrity against a teacher who pursues sordid ends."

App. A, 74a n. 2 (J. Jones, dissenting)

permissible to sexually molest the Respondent. App. A, 24a-25a The majority's sidelong analysis, however, misses the mark. The essential inquiries are whether it was reasonably known to *Lankford* that Stroud's prurient and self-gratifying acts could be attributed to the state for purposes of constitutional liability; and (2) whether his (Lankford's) mere inaction when faced with facts that the majority, in hindsight, believes point to sexual abuse, subjects him to Section 1983 liability.

The majority's "clearly established" analysis conflicts with the decisions of this Court, as well as the Seventh Circuit in *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987) and the Eleventh Circuit in *Barts v. Joyner*, 865 F.2d 1187, 1194 (11th Cir.), *cert. denied*, 493 U.S. 831 (1989). In *Harlow*, this Court held that there must be a factual connection between the action complained of and the cases establishing the clearly established law which is sufficient to apply those cases to the act at issue. 457 U.S. at 818. Similarly, the Eleventh Circuit requires that "a bright line be crossed," noting that such line cannot "be found in abstractions — to act reasonably, to act with probable cause, and so forth — but in studying how these abstractions have been applied in concrete circumstances." *Barts*, 865 F.2d at 1194. Finally, the Seventh Circuit likewise requires that the law be clear "in relation to the specific facts confronting the public official when he acted." *Colaizzi*, 812 F.2d at 308.

The majority's reliance on dissimilar cases is further aggravated by its failure to acknowledge the existence of conflicting decisions within the Fifth Circuit itself. As noted by Judge Garwood, the Fifth Circuit's decision addressing whether mere inaction can constitute "deliberate indifference" for purposes of imposing Section 1983 liability are inconsistent: "Our decisions in this area — like those of other circuits — are, unfortunately, not all of one piece." App. A, 66a (J. Garwood, dissenting); *see also* Section II, pp. 17-18 n. 11, *supra*. Similarly, the majority's "color

of law" analysis fails to address Fifth Circuit and Texas cases holding that sexual assaults committed by government employees are not under color of law. *See* App. A, 54a n. 7 (J. Garwood, dissenting); *see also* App. A, 102a-104a (J. Garza, dissenting) (collecting cases).

The Fifth Circuit's "clearly established" analysis likewise ignores the vast uncertainty that has existed in the area of supervisory liability under Section 1983. This Court did not decide *DeShaney* until 1989. In the same year, this Court vacated and remanded the Third Circuit's decision denying immunity to school administrators in *Stoneking v. Bradford Area Sch. Dist.*, 856 F.2d 594 (3rd Cir. 1988), *vacated sub nom., Smith v. Stoneking*, 489 U.S. 1062 (*Stoneking* I), with specific instructions to the Third Circuit to reconsider the school administrators' claims of qualified immunity in light of *DeShaney*. Likewise, *City of Canton v. Harris*, 489 U.S. 378 (1989), a municipality liability case which the majority curiously relies on to establish the contours of supervisory liability, was decided after the cause of action here arose.[16]

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16. Aside from the question of timing, *Canton*'s applicability to the personal liability of individual public school supervisors is doubtful. *Canton* held that in appropriate circumstances a *municipality* could be liable for constitutional violations resulting from its deliberately chosen training policy for city employees. It is one thing to hold the municipality as a whole liable in such an instance, as the entire corporate entity doubtless has the complete responsibility for and power and control over the training, assignment, and utilization of its employees, and the corporate entity as a whole is the recipient and beneficiary of their services. The case of individual supervisors is distinctly different.

App. A, 68a (J. Garwood, dissenting).

Finally, Judge Garwood's lament that the majority has "turned the concept of 'clearly established' on its head," App. A, 56a n. 10 (J. Garwood, dissenting), is perhaps best demonstrated by the court's refusal to reckon with the decision of the Chief Judge of the Southern District of Texas in *Von Drehle v. Houston Indep. Sch. Dist.*, No. H-88-539 (S.D. Tex. Nov. 21, 1989). *See* App. D.[17] *Van Drehle* involved the physical sexual abuse of special education students by a school employee. The plaintiffs contended, as was contended in this case, that the students had a constitutional right to be free from bodily harm at school. The district court, citing *DeShaney*, found that no such right in fact existed. App. D, 137a. If a federal district court in Texas could, in 1989, find that there was no constitutional right for a student to be free from bodily harm at school, then how could a Texas school administrator in Taylor, Texas, *in 1987*, know of such a right, let alone know that what he was doing — or not doing — violated that right?

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17. While *Von Drehle* was briefed and argued before the en banc court, it is not referenced in the court's opinion.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be granted and that the case be set for plenary review.

Respectfully submitted,

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APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED MARCH 3, 1994

Jane DOE, Plaintiff-Appellee,

v.

TAYLOR INDEPENDENT SCHOOL DISTRICT, et al., Defendants,

Mike Caplinger in his official capacities and Eddy Lankford in his official and individual capacities, Defendants-Appellants.

No. 90-8431

United States Court of Appeals,
Fifth Circuit.

March 3, 1994.

* * *

Patrick E. Higginbotham, Circuit Judge filed a concurring opinion in which Politz, Chief Judge, concurred.

Garwood, Circuit Judge, filed a dissenting opinion in which Edith H. Jones, Jerry E. Smith, Barksdale, Emilio M. Garza and DeMoss, Circuit Judges, joined.

Emilio M. Garza, Circuit Judge, concurred in part and dissented in part and filed opinion.

Opinion, 975 F.2d 137, vacated.

Appendix A

* * *

Appeal from the United States District Court for the Western District of Texas.

Before POLITZ, Chief Judge, GOLDBERG, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO M. GARZA, and DeMOSS, Circuit Judges.

E. GRADY JOLLY and W. EUGENE DAVIS, Circuit Judges:

Jane Doe was sexually molested by her high school teacher in Taylor, Texas. Defendant Eddy Lankford, principal of Taylor High, and defendant Mike Caplinger, superintendent of the Taylor Independent School District, were sued in their supervisory capacity by Jane Doe for permitting violations of her substantive due process right to bodily integrity. The district court denied their claim of qualified immunity, and they have filed this interlocutory appeal on that issue. We hold, first, that schoolchildren do have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment and that physical sexual abuse by a school employee violates that right. Second, we hold that school officials can be held liable for supervisory failures that result in the molestation of a schoolchild if those failures manifest a deliberate indifference to the constitutional rights of that child. Next, we conclude that each of these legal principles was clearly established in 1987, when the violations took place. Finally, in analyzing whether Caplinger and Lankford fulfilled the duty that they owed to Jane Doe, we reverse the district court's denial of immunity to defendant Caplinger, but we affirm its denial of immunity to Lankford.

Appendix A

I.

FACTS[1]

Defendant Jesse Lynn Stroud, a twenty-year veteran of Texas's public education system, was employed by the Taylor Independent School District as a biology teacher and assistant coach from 1981 until 1987. It was no secret within the school community that Coach Stroud behaved inappropriately toward a number of young female students over the course of his employment at Taylor High. He made little effort to conceal his fancy for these female students; he wrote notes to them, he let them drive his truck, he exhibited explicit favoritism toward them in class, and often touched them in an overly familiar, inappropriate way.

Defendant Eddy Lankford became the principal of Taylor High in August 1983. By the fall semester of 1985, complaints about Stroud's behavior had reached his office through various channels. During the previous 1984-1985 school year, Stroud had "befriended" one of his female freshman students. Their friendship far transgressed the boundaries of a normal, appropriate teacher-student relationship. Stroud frequently placed candy, flowers, and other gifts in her locker, and the two were often seen exchanging notes. He allowed her to take her friends to lunch in his truck. He wrote excuses for her when she was late for other classes. He often walked her to class, prompting students openly to tease Stroud

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1. Because this case is on appeal from the denial of a motion for summary judgment, we review the record *de novo*. We are required to review the facts in the light most favorable to the nonmoving party — here, Jane Doe. *See International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1263 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 936, 117 L.Ed.2d 107 (1992). Any disputes of fact are therefore resolved in Jane Doe's favor. *See id.*

about his relationship with this girl. Stroud also engaged in overt favoritism in his biology classes. Female students were not required to do classwork or to behave; they often wandered around the classroom, left the classroom during the class period, or changed their grades in Stroud's gradebook. Conversely, male students (with the exception of certain athletes who were coached by Stroud) were made to submit classwork, take tests, and generally behave like regular students.

By the fall of 1985, approximately one year after their "relationship" had begun, rumors about Stroud and the freshman student (by then a sophomore) were circulating not only among students and faculty but also among the town residents of Taylor. Stroud's favoritism in the classroom was also well-known within the school community. In addition, Stroud had also befriended a *new* female freshman student, and began a similar inappropriate relationship (note-writing, gift-giving, walking to class, etc.) with her. Principal Lankford approached Stroud outside the fieldhouse during the 1985 football season and spoke to him about being "too friendly" with the sophomore student.

Also during the fall of 1985, the school librarian, Mary Jean Livingood, received telephone calls from two friends whose children were students in Stroud's biology class. Both mothers complained about Stroud's favoritism toward certain students in the classroom and his use of sexual innuendo in his biology lectures. Livingood had also seen Stroud engaging in unprofessional conduct; he often grabbed girls around the waist from behind in the hallways or excessively hugged girls while putting his arms around them. Livingood reported the inappropriate behavior she had witnessed to Principal Lankford and also informed him of the two telephone calls she had received from parents. Additionally, one of the mothers who had initially called Livingood also called Lankford to complain about Stroud's

favoritism in the classroom. Although Lankford claims that he spoke with Stroud about these complaints, Stroud does not recall any such meeting.

In the spring of 1986, guidance counselor Naomi Pasemann noticed a group of girls gathered around Stroud's desk before school one day; one of the girls was sitting on top of the desk, while Stroud was seated behind the desk with the rest of the girls around him. Pasemann told Lankford about this incident; the two also discussed Stroud's practice of allowing unlicensed freshmen to drive his truck. Later that spring, the mothers of two female students in Stroud's biology class met with Lankford and complained about Stroud's overt favoritism toward certain girls in the class. Lankford suggested that their daughters were "a little bit jealous" of those girls in the favored group.

In May of 1986, Livingood reported to Lankford that she had witnessed an episode of "child molestation" involving Stroud and two freshman female students. Livingood noticed that the lights in the copy room at the library were off; as she approached the room, she heard loud laughing and talking. When she looked into the room, she saw Stroud lifting the female students onto a table and catching them as they jumped off of the table into his arms. She insisted that Stroud stop the behavior. She immediately reported the incident to Lankford.

Lankford downplayed the incident. He told Livingood that he put his arms around cheerleaders at pep rallies all the time, and joked that he had invented the popular "pro-hugging" bumper stickers often seen on automobiles.[2] Livingood explained that the behavior that she witnessed was of a different ilk, was

2. The bumper stickers to which Lankford referred are emblazoned with some variation of the slogan "Have you hugged your child (dog, cat, tree, etc.) today?"

inappropriate, and was akin to "child molestation." When Stroud later approached Lankford to discuss the incident, the two men agreed that the librarian had overreacted. Lankford did not warn or discipline Stroud — even mildly — for any incident or conduct. Indeed, Lankford failed to document any of the complaints he received about Stroud.

All of this behavior occurred before defendant Mike Caplinger ever moved to Taylor or worked for the Taylor Independent School District. Caplinger became the superintendent of the Taylor ISD in July 1986; Lankford did not inform Caplinger of any problems — real or potential — with Stroud or with his pattern of conduct.

Plaintiff Jane Doe entered Taylor High as a freshman in August 1986; she was a student in Stroud's biology class. Stroud began his seduction of Doe by writing personal — often suggestive — comments on her homework and test papers. The two began exchanging notes and telephoning each other; he often walked her to class. Stroud took Doe and her friends to lunch during the school day and bought alcoholic beverages for them. He did not require Doe to do classwork or to take tests, yet she received high grades in Stroud's class. Not surprisingly, all of this attention flattered Doe, and she developed a "crush" on Stroud.

By late fall, Stroud was touching and kissing Jane Doe. It began with a kiss on her cheek as she was leaving the school fieldhouse one day. Eventually, he began taking her into the laboratory room adjacent to his classroom and to the fieldhouse to engage in kissing and petting. Their physical relationship escalated to heavy petting and undressing in January 1987, when Stroud took Doe and some of her friends, including his own daughter, to a rock concert. There, he bought her alcoholic beverages, took her back to

the fieldhouse, and began caressing her in the most intimate of ways. He suggested intercourse, but she refused.

Rumors about Doe and Stroud were rampant among the students and faculty by this time. The two were constantly together — walking to class, riding in the car, going out to lunch. Doe often went to Stroud's classroom during other class periods. Coaches and students frequently teased Stroud about his relationship with Doe, often mentioning the two freshman girls he had befriended during the two previous years. Sometime in January 1987, Lankford heard that Stroud had taken Doe and other students to the rock concert; that month he also received complaints from four female students in Stroud's biology class about Stroud's favoritism toward certain students. Lankford spoke with Stroud about this complaint, and, for the first time, notified Caplinger about possible problems with Coach Stroud.

In early February 1987, Mickey Miller, the assistant principal of Taylor's middle school, reported to Caplinger that at a basketball game he had witnessed Stroud behaving inappropriately with several freshman girls, including Jane Doe. Instead of sitting with the team, Stroud was sitting with the girls engaging in horseplay — the girls played with his hair as he halfheartedly "defended" himself. Caplinger instructed Lankford to speak with Stroud about this incident, which he did; the athletic director, Eddy Spiller, also spoke with Stroud about the report. Spiller later told Lankford that he had asked Stroud if Stroud was "fooling around with any of these little old girls," and that Stroud had denied any such behavior. Lankford acknowledges that he did not ask Spiller what prompted him to confront Stroud with this direct question.

On Valentine's Day, Stroud gave Jane Doe a valentine that read: "To my most favorite, prettiest, sweetest, nicest sweetheart in

the world! Please don't change cause I need you. I'm in love with you. Forever — for real — I love you." A friend and classmate of Jane Doe's, Brittani B., found the valentine in Doe's purse and took it to Pasemann, the guidance counselor. Brittani told Pasemann about the exchange of notes and gifts between Doe and Stroud, and shared her suspicions that the two were having a sexual relationship. Pasemann told Brittani that she had heard the rumors about Stroud and Doe, and instructed her to take the note to Principal Lankford.

Brittani took the note to Lankford the next day; when she went into his office, he insisted that a witness be present for the meeting to ensure, according to him, "that rumors won't start like those about Stroud and [Doe]." Lankford examined the note and admitted that the handwriting looked like Stroud's, but told Brittani that he had no proof that it was from Stroud because it was not signed. Lankford told Brittani that Stroud merely had a way of flirting with the girls, and that such behavior was Stroud's "way of doing things." Lankford did not keep a copy of the note and did not investigate the matter further; he did not tell Superintendent Caplinger about the incident, nor did he speak with Stroud or Doe. His only action was to transfer Brittani out of Stroud's biology class.

After a school-sponsored Valentine's Day dance, Jane Doe spent the night at Stroud's home; Doe had befriended Stroud's daughter, and Stroud had invited Doe to spend the night. While Doe was there, Stroud again suggested to her that they have intercourse. Once again, she refused. She spent several nights at the Stroud home over the next few months. In late March or early April 1987, Stroud and Doe had intercourse for the first time. She was fifteen years old. Stroud was her first sexual partner.

Appendix A

Over the next several months, Stroud and Doe had repeated sexual contact. Sex occurred at different locations, both on and off school grounds. Their romantic relationship — although perhaps not the extent of it — was common knowledge within the Taylor High community, not only among students, but also among the faculty and the parents of many students. Lankford asked a friend whose daughter was a student at the high school to "keep his ears open" for information about Doe and Stroud. On Stroud's performance evaluation by Lankford for the 1986-1987 academic year, however, there was nothing to indicate that Stroud's performance was anything less than fully satisfactory. Indeed, Lankford still had not even informally documented any incident or pattern of conduct relating to Stroud.

In June 1987, Stroud took Doe and some other girls, along with his family, to a local fair, the Corn Festival, where he once again provided them with alcoholic beverages. At least one of the girls became intoxicated. Stroud's wife angrily left the festival when Stroud began dancing with Doe. Stroud and Doe left the festival together, went out to a field, and had sexual intercourse. Later, he and Doe went to his home, where Doe spent the night, and had intercourse again. Two concerned parents, both prominent members of the community, reported to Caplinger that Stroud was behaving inappropriately with Jane Doe at this festival, that Mrs. Stroud had left the festival because of his behavior, and that there was a possibility that he and Doe had left the festival together. One of the parents also showed Caplinger notes that Stroud had written to his daughter.

In response to the report, Caplinger contacted the parents of the girl who, according to the story, was intoxicated and misbehaving at the festival in the company of Doe and Stroud. When the girl's mother assured him that her daughter had not even

been at the festival, that she had been sick and at home, Caplinger dismissed the report as unfounded without investigating further or contacting Jane Doe's parents to discuss the report with them.

Caplinger was by now aware of the rumors about Stroud and Doe and the reports of his favoritism in the classroom. He contacted the school's attorney to discuss the situation concerning Stroud, and, apparently at Caplinger's instruction, Lankford contacted the Texas Education Authority to see if there were any reports about Stroud concerning any inappropriate behavior at the schools where he had previously been employed. Lankford was told there were no reports specifically naming Stroud, but that the Authority had received an anonymous tip about an inappropriate relationship between a coach and a student at Taylor High.

In July 1987, Doe's parents discovered photographs of Stroud among Doe's possessions with such handwritten inscriptions by Stroud as: "Please don't ever change and don't ever leave me. I want to be this close always — I love you — Coach Lynn Stroud." Doe's parents immediately scheduled a meeting with Caplinger. At the meeting, they showed him the photographs. Caplinger confirmed to them that he was aware of rumors concerning Stroud and Doe and told them about the Corn Festival incident. He promised to convene a meeting of all the parties involved. After speaking with Doe's parents, Caplinger spoke with Jane Doe privately in his office. He showed her the photographs her parents had just presented to him and inquired about the nature of her relationship with Stroud. Doe suggested that the notes on the photos were just "friendly gestures." She explicitly denied any sexual relations with Stroud.

Caplinger called Lankford after the meeting with the Does, who in turn called Stroud. Upon receiving the message, Stroud

sought out Lankford; before Lankford had a chance to explain to Stroud that there had been a meeting with the Does concerning some photographs that he had given to Jane, Stroud vehemently denied any sexual involvement with Doe. For the first time, Lankford spoke of disciplinary consequences. Lankford suggested to Stroud that he resign or take an in-school suspension (which would relieve him of his classroom duties), but Stroud refused. Lankford and Stroud then went over to Caplinger's house at approximately 9:30 p.m. that evening. Caplinger, who had guests in his house, left his house and went to his office accompanied by Lankford and Stroud. There, the three men discussed the situation. Caplinger and Lankford warned Stroud to keep his distance from Jane Doe, and that he would be fired "if something was going on." No further action was taken, however; the meeting that Caplinger had promised to schedule never took place, and Stroud did not hear from either Lankford or Caplinger again until October 6, the day he was suspended from employment.

Although Jane Doe was able to stay away from Stroud for the remainder of the summer vacation, when classes resumed in the late summer of 1987, Stroud's sexual advances towards her resumed as well, and soon thereafter they began having intercourse again. Lankford admits that he watched Stroud no more closely than he previously had. The sexual contact continued into the fall of Jane Doe's sophomore year, until October 5, when Doe's mother found more love letters from Stroud among Jane's possessions. The Does then consulted their family lawyer, who agreed to discuss the matter with Jane. Upon meeting with Jane, the attorney learned the truth about her sexual involvement with Stroud. Doe explained that she had kept the matter a secret because she feared the repercussions of disclosure.

The attorney reported the information to Caplinger at once. Coincidentally, on the same day, the mother of another female

student contacted the administration to report that her daughter had also been victimized by Stroud; Stroud had grabbed the student's buttocks in class that day. Caplinger ordered Stroud immediately suspended from employment. Stroud later resigned his position and pled guilty to criminal charges stemming from his molestation of Jane Doe.

II

PROCEDURAL HISTORY

Jane Doe brought this § 1983 civil rights lawsuit against Stroud, the school district, Superintendent Caplinger, and Principal Lankford. She charged *inter alia* that these defendants, while acting under color of state law, deprived her of her constitutional rights guaranteed by the Fourteenth Amendment's Due Process and Equal Protection Clauses, in violation of 42 U.S.C. § 1983. Following the denial of their motions for summary judgment on qualified immunity grounds, Caplinger and Lankford filed this appeal. Both contend that they are entitled to qualified immunity because: (1) Jane Doe was not deprived of any constitutional right when she was sexually molested by Coach Stroud; (2) even if Doe was deprived of a constitutional right, they owed her no duty in connection with this constitutional violation; (3) even if Doe was deprived of a constitutional right and they owed her a duty with respect to that right, these issues of law were not "clearly established" in 1987 when the violations took place; and (4) in any event, their response to the situation satisfied any duty that they owed to Doe.

Appendix A

III

DUE PROCESS

A

The first step in deciding whether Caplinger and Lankford are entitled to claim qualified immunity from this lawsuit is to determine whether the Constitution, through the Fourteenth Amendment's substantive due process component, protects school-age children attending public schools from sexual abuse inflicted by a school employee. "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Baker v. McCollan*, 443 U.S. 137, 146, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433, 443 (1979). To state a cause of action under § 1983 for violation of the Due Process Clause, plaintiffs "must show that they have asserted a recognized 'liberty or property' interest within the purview of the Fourteenth Amendment, and that they were intentionally or recklessly deprived of that interest, even temporarily, under color of state law." *Griffith v. Johnston*, 899 F.2d 1427, 1435 (5th Cir.1990) (citations omitted), *cert. denied*, 498 U.S. 1040, 111 S.Ct. 712, 112 L.Ed.2d 701 (1991). "The Supreme Court has expanded the definition of 'liberty' beyond the core textual meaning of that term to include [not only] the . . . privileges [expressly] enumerated by the Bill of Rights, [but also] the 'fundamental rights implicit in the concept of ordered liberty' and 'deeply rooted in this Nation's history and tradition' under the Due Process Clause." *Id.; see also Bowers v. Hardwick*, 478 U.S. 186, 191, 106 S.Ct. 2841, 2844, 92 L.Ed.2d 140, 146 (1986); *Hewitt v. Helms*, 459 U.S. 460, 466, 103 S.Ct. 864, 869, 74 L.Ed.2d 675, 684-85 (1983); *Moore v. City of East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 1937, 52 L.Ed.2d 531, 539-40 (1977).

Appendix A

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive a person of life, liberty or property without due process of law." The Supreme Court has noted: "Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, at least since *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 [in 1887], the Clause has been understood to contain a substantive component as well. . . ." *Planned Parenthood v. Casey*, __ U.S. __, __, 112 S.Ct. 2791, 2804, 120 L.Ed.2d 674, 695 (1992) (citation omitted). This substantive component of the Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.' " *Collins v. City of Harker Heights*, __ U.S. __, __, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261, 273 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662, 668 (1986)).

Jane Doe's substantive due process claim is grounded upon the premise that schoolchildren have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment and upon the premise that physical sexual abuse by a school employee violates that right. This circuit held as early as 1981 that "[t]he right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process." *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir.1981). *Shillingford* involved a § 1983 action by a tourist against a New Orleans police officer. Shillingford was attending Mardi Gras festivities in New Orleans when he attempted to take a photograph of the officer making an arrest. The officer was annoyed and struck Shillingford with his nightstick, inflicting some physical injury. We found such action sufficient "to transcend the bounds of ordinary tort law and establish a

deprivation of constitutional rights." *Id.* at 266.

We cited *Shillingford* for this principle of law in *Jefferson v. Ysleta Independent School District,* 817 F.2d 303, 305 (5th Cir.1987), a case involving a violation of a schoolchild's substantive due process rights by a teacher. The teacher in *Jefferson* lashed a second grade student to a chair for the better part of two school days. Again, we found that such actions by the teacher violated the student's substantive due process " 'right to be free of state-occasioned damage to [her] bodily integrity.' " *Id.* (quoting *Shillingford,* 634 F.2d at 265). We have also held that the infliction of "corporal punishment in public schools 'is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning.' " *Fee v. Herndon,* 900 F.2d 804, 808 (5th Cir.) (quoting *Woodward v. Los Fresnos Indep. Sch. Dist.,* 732 F.2d 1243, 1246 (5th Cir.1984)), *cert. denied,* 498 U.S. 908, 111 S.Ct. 279, 112 L.Ed.2d 233 (1990).

If the Constitution protects a schoolchild against being tied to a chair or against arbitrary paddlings, then surely the Constitution protects a schoolchild from physical sexual abuse — here, sexually fondling a 15-year old school girl and statutory rape — by a public schoolteacher. Stroud's sexual abuse of Jane Doe, earlier detailed in this opinion is not contested by the defendants. Thus, Jane Doe clearly was deprived of a liberty interest recognized under the substantive due process component of the Fourteenth Amendment.[3] It is incontrovertible that bodily integrity is

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3. Although the appellants seem to argue that in its opinion in *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 198-200, 109 S.Ct. 998, 1005-06, 103 L.Ed.2d 249, 260-62 (1989), the Supreme Court overruled the portion of *Jefferson* declaring the existence of such a substantive due process right,

(Cont'd)

necessarily violated when a state actor sexually abuses a

(Cont'd)
such a view is a serious misreading of *DeShaney's*. In *DeShaney*, a child was rendered comatose by injuries inflicted by his own father, a *private* (as opposed to state) actor. The plaintiffs argued that because the state had notice of the possibility of abuse of the child, and in fact had intervened in the relationship (obviously ineffectively) before the final episode of abuse, it deprived the child of his right to protection afforded by substantive due process. The Court categorically rejected this argument on the ground that nothing in the Due Process Clause requires the state to protect its citizens' liberty interests against invasions by private actors.

The Court then went on to address the plaintiffs' alternative argument, and it is this portion of the opinion from which the appellants seek support for their position that they owed no constitutional duty to Jane Doe. The *DeShaney* plaintiffs argued that even if the Due Process Clause does not protect citizens from injuries by private actors (which actually assumes that no violation of a constitutional right even occurred), an affirmative duty on the part of the state may nonetheless arise out of "special relationships" created between the state and particular individuals, *i.e.*, that the state had a duty to protect particular individuals in its charge. It is in this context — addressing an argument advocating a derivative constitutionally-based duty on the part of the state to protect citizens from harm by private actors if those citizens stand in a "special relationship" to the state — that the Court suggested that state officials' duty to protect citizens under the Due Process Clause was limited to those persons whose freedom has been affirmatively restrained by the state.

The appellants seem to argue that because schoolchildren cannot be said to be affirmatively restrained by the state merely because they are compelled to attend school, no "special relationship" arises between the schoolchild and the state, and thus the child possesses no substantive due process rights in his status as a public school student. The cited remarks from the *DeShaney* court simply do not address the issues involved in this case. First, *DeShaney* does not suggest that individuals, whether "under the state's care" or not, have no due process rights against an offending state actor. Consequently, *DeShaney* does not in the slightest diminish the constitutional due process rights belonging to Jane Doe against Lynn Stroud. Second, *DeShaney* is possibly relevant to the constitutional duty imposed on Caplinger and Lankford, but only if an affirmative duty to protect students from constitutional violations is placed on them, a duty which even Jane Doe disavows.

schoolchild and that such misconduct deprives the child of rights vouchsafed by the Fourteenth Amendment.[4] Obviously, there is never any justification for sexually molesting a schoolchild, and thus, no state interest, analogous to the punitive and disciplinary objectives attendant to corporal punishment, which might support it.[5]

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4. Lankford and Caplinger argue first that Stroud's actions were not taken under color of state law. They rely on *D.T. by M.T. v. Independent School District No. 16*, 894 F.2d 1176 (10th Cir. 1990), in which a teacher molested three students during the summer while engaged in a fundraising campaign for a basketball camp. The school made it clear to the teacher that the fundraising activity was not a school program but rather was organized as a community volunteer effort. In this case, however, Stroud took full advantage of his position as Doe's teacher and coach to seduce her. He required Doe to do little or no work in the classroom and still gave her A's. He also spoke to one of Doe's other teachers about raising her grade in that class. Stroud was also Doe's basketball coach and he exploited that position as well. The first physical contact Stroud had with Doe was after a basketball game in November 1986 when he grabbed her and kissed her. Stroud's physical contact with Doe escalated thereafter. During the next several months Stroud took Doe from his classroom to an adjoining lab room where he kissed and petted her. During that same period of time Stroud also met Doe in the school's fieldhouse where similar activity took place.

As the court in *D.T.* recognized, if a "real nexus" exists between the activity out of which the violation occurs and the teacher's duties and obligations as a teacher, then the teacher's conduct is taken under color of state law. *Id.* at 1188. As demonstrated by the above facts, the nexus that was missing in *D.T.* was clearly present in this case. We therefore reject the school officials' argument that Stroud's acts were not under color of state law.

5. Thus, those cases in this circuit that have held that the infliction of excessive corporal punishment does not violate due process are inapposite. *See, e.g., Fee v. Herndon*, 900 F.2d 804 (5th Cir.), *cert. denied*, 498 U.S. 908, 111 S.Ct. 279, 112 L.Ed.2d 233 (1990).

Having concluded that Stroud's physical sexual abuse of Jane Doe violated her constitutional right to substantive due process, we next must decide whether school officials, like the appellants in this case, owe any duty to a schoolchild when a subordinate violates that child's constitutional rights. Section 1983 provides a claim against anyone who, "under color of" state law, deprives another of his or her constitutional rights. 42 U.S.C. § 1983; *see, e.g., Collins v. City of Harker Heights*, ___ U.S. ___, ___, 112 S.Ct. 1061, 1066, 117 L.Ed.2d 261, 270 (1992).

In *Monell v. New York City Department of Social Services*, 436 U.S. 658, 691-94, 98 S.Ct. 2018, 2037-38, 56 L.Ed.2d 611, 635-38 (1978), the Supreme Court held that Congress intended § 1983 to apply to local government entities as well as to persons. The Court, however, also held that local governments cannot be held liable under § 1983 on a *respondeat superior* theory. Similarly, we have held that supervisory officials may not be found vicariously liable for the actions of their subordinates under § 1983.[6] *Lopez v. Houston Indep. Sch. Dist.*, 817 F.2d 351, 355 (5th Cir.1987) (citing *Thibodeaux v. Arceneaux*, 768 F.2d 737, 739 (5th Cir.1985)).

This circuit has held that supervisors can be liable for "gross negligence" or "deliberate indifference" to violations of their

6. The dissent argues that the Supreme Court in *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), determined that a supervisor could not be liable for a mere failure to act; a supervisor must have engaged in affirmative conduct in order to be held liable. We do not read *Rizzo* so broadly and neither does the Supreme Court. In *Monell*, 436 U.S. at 694 n. 58, 98 S.Ct. at 2037 n. 58, 56 L.Ed.2d at 637 n. 58, the Court read *Rizzo* as having decided "that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability." *Rizzo* therefore does not preclude liability for a supervisor who in fact controls a subordinate or who fails to supervise a subordinate.

subordinates. In *Hinshaw v. Doffer*, 785 F.2d 1260, 1262 (5th Cir.1986), Hinshaw sued both the police chief and his deputy for the deputy's excessive use of force in arresting Hinshaw, who had come to the police station to investigate a report that the police had arrested and roughed up his son. We established a three-part test for supervisory liability in which, "the plaintiff must show that: 1) the police chief failed to supervise or train the officer, 2) a causal connection existed between the failure to supervise or train and the violation of the plaintiff's rights, and 3) such failure to supervise or train amounted to gross negligence or deliberate indifference." *Id.* at 1263.

In *Lopez*, we applied these same principles when we adopted a narrow duty on the part of school officials: a duty not to "callously disregard" a student's constitutional rights. *Id.* 817 F.2d at 355. The *Lopez* panel, throughout its opinion, interchangeably used the terms "callous disregard," "deliberately indifferent," "grossly negligent," and "callous indifference." In addition, in a case involving a municipality's alleged failure to train its employees, the Supreme Court rejected the gross negligence standard of liability in favor of the stricter[7] deliberate indifference standard. *City of Canton v. Harris*, 489 U.S. 378, 381, 388, 109 S.Ct. 1197, 1200-01, 1204, 103 L.Ed.2d 412, 421-22, 426 (1989). The Court's reasoning in assessing a municipality's liability leads us to use the same standard in assessing an individual supervisor's liability under § 1983.

In *Canton*, the Supreme Court held that a municipality is

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7. Although these terms are sometimes used interchangeably, "gross negligence" and "deliberate indifference" involve different degrees of certainty, on the part of an actor, that negative consequences will result from his act or omission. Whereas the former is a "heightened degree of negligence," the latter is a "lesser form of intent." *Germany v. Vance*, 868 F.2d 9, 18 n. 10 (1st Cir.1989).

responsible in certain circumstances under § 1983 for a failure to train its employees that results in the violation of a plaintiff's right to receive necessary medical attention while in police custody. *Id.* The Court explained, however, that such liability, predicated on a violation of the plaintiff's right under the Due Process Clause of the Fourteenth Amendment, depends on a showing of (1) a "deliberately indifferent" policy of training that (2) was the "closely related" cause of the violation of the plaintiff's federally protected rights. *Id.* at 388, 391, 109 S.Ct. at 1204, 1206, 103 L.Ed.2d at 426, 428. The Court explained that "to adopt lesser standards of fault and causation" would result in *de facto respondeat superior* liability for municipalities:

> In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident. Thus, permitting cases against cities for their 'failure to train' employees to go forward under § 1983 on a lesser standard of fault would result in de facto respondeat superior liability on municipalities — as a result we rejected in *Monell.*

Id. at 392, 109 S.Ct. at 1206, 103 L.Ed.2d at 428 (citation omitted). The Court further explained that lesser standards of fault and causation would require the federal courts endlessly to "second-guess" the wisdom of municipal training programs, a task inappropriate for the federal judiciary. *Id.* One commentator has suggested a third reason for the Court's holding: "[O]nly when training deficiencies are the result of deliberate indifference will the trier of fact be able to conclude that inadequate training was the

actual or 'closely related' cause of the violation of the plaintiff's federal rights." Martin A. Schwartz & John E. Kirklin, 1 *Section 1983 Litigation: Claims, Defenses, and Fees* § 7.9, at 372 (2d ed. 1991).

The most important difference between *City of Canton* and this case is that the former dealt with a municipality's liability whereas the latter deals with an individual supervisor's liability. The legal elements of an individual's supervisory liability and a political subdivision's liability, however, are similar enough that the same standards of fault and causation should govern. A municipality, with its broad obligation to supervise all of its employees, is liable under § 1983 if it supervises its employees in a manner that manifests deliberate indifference to the constitutional rights of citizens. We see no principled reason why an individual to whom the municipality has delegated responsibility to directly supervise the employee should not be held liable under the same standard. Other circuits have reached substantially the same result. *See Sample v. Diecks*, 885 F.2d 1099, 1117-18 (3d Cir.1989) ("Although the issue here is one of individual liability rather than of the liability of a political subdivision, we are confident that, absent official immunity, the standard of individual liability for supervisory public officials will be found to be no less stringent than the standard of liability for the public entities that they serve." (footnote omitted)); *Greason v. Kemp*, 891 F.2d 829, 837 (11th Cir.1990); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir.1989) (*Stoneking II*), *cert. denied*, 493 U.S. 1044, 110 S.Ct. 840, 107 L.Ed.2d 835 (1990); *Jane Doe "A" v. Special Sch. Dist.*, 901 F.2d 642 (8th Cir.1990).

There are other differences between *Canton* and this case. For example, *City of Canton* involved a different kind of supervisory liability, failure to train, from that involved here. Moreover, the plaintiff in *City of Canton* alleged a violation of her substantive due

process right to receive medical attention whereas the plaintiff in this case alleges a violation of her substantive due process right to be free from sexual abuse. The similarities between the cases, however, are more important than the differences: Both cases involve alleged failures of supervisors to prevent substantive due process violations occasioned by their subordinates.[8] Thus, in *Gonzalez v. Ysleta Independent School District*, 996 F.2d 745, 753-60 (5th Cir.1993), we applied *City of Canton* to an elementary school student's § 1983 claim against a school district for supervisory failures that led to a teacher's violation of her substantive due process right to bodily security.[9] We concluded that the school district could be held liable for supervisory failures resulting in the molestation of the student only if those failures "manifested a deliberate indifference to the welfare of the school children." *Id.* 996 F.2d at 760. We therefore hold that a school official's liability arises only at the point when the student shows that the official, by action or inaction, demonstrates a deliberate indifference to his or her constitutional rights.

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8. Even if the underlying constitutional violation were different from that involved in *City of Canton*, the deliberate indifference standard for liability would apply. As the Supreme Court explained, this standard of liability derives from the language of § 1983, which provides a remedy against anyone who, under color of state law, "causes" another to be subjected to a violation of his or her constitutional rights. *City of Canton*, 489 U.S. at 388 n. 8, 109 S.Ct. at 1204 n. 8, 103 L.Ed.2d at 426 n. 8. In contrast, the standard of liability in a case against the actual perpetrator of a constitutional violation derives from the particular constitutional provision at issue, not from § 1983. *Daniels v. Williams*, 474 U.S. 327, 329-30, 106 S.Ct. 662, 664, 88 L.Ed.2d 662, 667 (1986); *Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 759 (5th Cir.1993).

9. The school district conceded that the elementary school teacher's molestation of one of his students violated her "constitutional right to personal security." *Gonzalez*, 996 F.2d at 750 n. 6.

Using this standard, we adopt the following test, which determines the personal liability of school officials in physical sexual abuse cases. A supervisory school official can be held personally liable for a subordinate's violation of an elementary or secondary school student's constitutional right to bodily integrity in physical sexual abuse cases if the plaintiff establishes that:

(1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student; and

(2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and

(3) such failure caused a constitutional injury to the student.

C

We must next consider these legal principles in the context of qualified immunity. Under the shield of qualified immunity, Caplinger and Lankford cannot be held liable under § 1983 unless (1) Jane Doe's liberty interest under the substantive due process component of the Fourteenth Amendment, and (2) Caplinger's and Lankford's duty with respect to Jane Doe's constitutional right were "clearly established" at the time these events took place. *See Stem v. Ahearn*, 908 F.2d 1, 5 (5th Cir. 1990), *cert. denied*, 498 U.S. 1069, 111 S.Ct. 788, 112 L.Ed.2d 850 (1991). For a constitutional right to be clearly established, "[t]he contours of the right must be

sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523, 531 (1987). The term "clearly established" does not necessarily refer to "commanding precedent" that is "factually on all-fours with the case at bar," or that holds the "very action in question" unlawful. *Jefferson*, 817 F.2d at 305 (footnote omitted); *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039, 97 L.Ed.2d at 531. Rather, a constitutional right is clearly established if "in the light of pre-existing law the unlawfulness [is] apparent." *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039, 97 L.Ed.2d at 531. Put another way, officials must observe "general, well-developed legal principles." *Jefferson*, 817 F.2d at 305.

Lankford and Caplinger argue, first, that the underlying constitutional right, to be free of sexual abuse, was not clearly established in 1987. Second, they assert that even if the underlying constitutional right was clearly established in 1987, their duty under § 1983 not to be deliberately indifferent to a subordinate's violation of that right was not clearly established.

The "contours" of a student's substantive due process right to be free from sexual abuse and violations of her bodily integrity were clearly established in 1987. In 1987 this court held that it was clearly established in 1985 that the Due Process Clause protects a schoolchild from being lashed to a chair for the better part of two days for "instructional purposes." *Jefferson*, 817 F.2d at 305. As the panel in this case noted, Judge Posner has observed:

> There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if

> such a case arose, the officials would be immune from damages liability. . . .

K.H. ex rel. Murphy v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990). This case involves similarly egregious and outrageous conduct. Indeed, this much seems crystal clear: No reasonable public school official in 1987 would have assumed that he could, with constitutional immunity, sexually molest a minor student.[10]

Not only was the underlying violation clearly established in 1987, but Lankford's and Caplinger's duty with respect to that violation was also clearly established at that time. In *Lopez*, a student who was knocked unconscious during a fight on a school bus sued the bus driver's supervisors under § 1983, alleging that the supervisors' failure to properly train the driver resulted in the driver's failure to break up the melee and render medical assistance. 817 F.2d at 353, 355. In that case, we held that the

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10. The appellants' citation to *Spann v. Tyler Independent School District*, 876 F.2d 437, 438 (5th Cir. 1989), *cert. denied*, 493 U.S. 1047, 110 S.Ct. 847, 107 L.Ed.2d 841 (1990), is unavailing. The fact that we "assume" a duty for purposes of writing an opinion, as we did in *Spann*, does not support a conclusion that no duty existed.

Citing *Martherne v. Wilson*, 851 F.2d 752, 759 (5th Cir. 1988), Lankford and Caplinger also argue that when a right must be reexamined in the light of new precedent, it is not "clearly established" within the meaning of *Anderson*. Thus, they attempt to find significance in the fact that the Supreme Court vacated and remanded another sexual abuse case, *Stoneking v. Bradford Area School District*, 856 F.2d 594 (3d Cir. 1988) (*Stoneking I*), with instructions to reconsider the school administrator's claims of qualified immunity in the light of the *DeShaney* opinion. *See Smith v. Stoneking*, 489 U.S. 1062, 109 S.Ct. 1333, 103 L.Ed.2d 804 (1989). *Matherne*, however, is distinguishable because it involved a question of whether a public employee could engage in political activity, an issue that requires a difficult balancing of interests and has resulted in conflicting case law. *Matherne*, 851 F.2d at 756-59.

supervisors could be found liable if they "callously disregarded," or were "grossly negligent" to, the student's right to bodily integrity and if their failure to train resulted in the violation of that right. *Id.* at 355. Our cases before *Lopez*, although arising under somewhat different circumstances, also acknowledged a duty on the part of supervisors not to be grossly negligent or deliberately indifferent to constitutional violations perpetrated by their subordinates. For example, in *Wanger v. Bonner*, 621 F.2d 675 (5th Cir. 1980), we upheld a trial court's instruction that a sheriff could be liable for his deputies' activities even though he did not participate in them, "if you find that he failed to adequately supervise or train his deputies, thus causing a violation of plaintiffs' civil rights." *Id.* at 680. In *Bowen v. Watkins*, 669 F.2d 979, 988 (5th Cir. 1982), we observed generally that:

> Although supervisory officials cannot be held liable solely on the basis of their employer-employee relationship with a tortfeasor, they may be liable when their own action or inaction, including a failure to supervise that amounts to gross negligence or deliberate indifference, is a proximate cause of the constitutional violation.

We also held that a municipality's supervisory liability for a police officer's violation of a citizen's constitutional rights depended on a showing that, among other things, the municipality displayed "gross negligence amounting to conscious indifference." *Languirand v. Hayden*, 717 F.2d 220, 227 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215, 104 S. Ct. 2656, 81 L.Ed.2d 363 (1984); *see also Hinshaw v. Doffer*, 785 F.2d 1260 (5th Cir. 1986).

In the face of this precedent, Lankford and Caplinger point to

no authority from this circuit involving school officials which would enable them to reasonably believe, in 1987, that they could be deliberately indifferent to their subordinate's violation of a student's constitutional rights and escape supervisory liability under § 1983. In fact, *Lopez* and our earlier cases arguably announced a broader duty on the part of school officials than we adopt today. *See Lopez*, 817 F.2d at 355. By narrowing the duty that § 1983 imposes on supervisors, the courts have not affected its status as "clearly established."

D

Having established that Jane Doe's constitutional right to bodily integrity and the appellants' duty with respect to that right were clearly established in 1987 when these events occurred, we must determine whether, on the record before us, Lankford and Caplinger have established that they satisfied their duty to Doe, and are thus entitled to summary judgment as a matter of law.[11]

The plaintiff in this case has adduced clear summary judgment evidence of deliberate indifference by defendant Lankford toward her constitutional rights.[12] By 1987, Lankford had certainly

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11. Because this case is on appeal from the denial of a motion for summary judgment, we review the record *de novo*. We are required to review the facts in the light most favorable to the nonmoving party—here, Jane Doe. *See International Shortstop, Inc. v. Rally's Inc.*, 939 F.2d 1257, 1263 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 936, 117 L.Ed.2d 107 (1992). Any disputes of fact are therefore resolved in Jane Doe's favor. *See id.*

12. Deliberate indifference will often be a factladen question—as it is in this case—and, consequently, it is impossible for us to draw bright lines in such an inquiry. We can foresee many good faith but ineffective responses that might satisfy a school official's obligation in these situations, *e.g.*, warning the state actor, notifying

(Cont'd)

received notice of a pattern of inappropriate behavior that had been committed by Stroud that suggested misconduct of a sexual nature. He had spoken with Stroud two years earlier, in 1985, about being "too friendly" with a particular female student. He had received complaints from parents about Stroud's favoritism toward certain girls in the classroom. The school librarian reported Stroud's inappropriate behavior with female students to Lankford on two occasions, and at one point described the incident she witnessed as "child molestation." More importantly, Lankford received knowledge that Stroud was directing his inappropriate sexual behavior specifically toward Doe. He had heard about Mickey Miller's report of Stroud's misconduct with freshman girls, including Jane Doe, at a school basketball game. A jury could find that Lankford then received a clear signal that Stroud and Doe were engaged in a sexual relationship when Brittani B. gave him the valentine in February 1987. Later that year, Lankford received

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(Cont'd)
the student's parents, or removing the student from the teacher's class. Indeed, if Lankford had sternly warned Stroud early on to stay away from Doe or risk termination and Lankford then received no later indication of further misconduct, the standard of deliberate indifference would be difficult to establish.

It has been suggested that our opinion today might force a school official to subject himself to liability by acting on incomplete information. This misinterpretation should be corrected. Surely an official does not expose himself to liability by reporting the information to a superior; or by advising a subordinate state actor of rumors or information that the official has received and warning the actor that severe disciplinary action will be taken if the rumors are confirmed; or if plausible information of misconduct continues to come to his attention to investigate such information; or if disputes arise as to the reliability of that information, to hold a hearing—closed door, if justified—to resolve such disputes. In short, there are many courses of action open to a school official that negate deliberate indifference but do not expose the official to liability on grounds of taking premature disciplinary action against a state actor.

reports about Stroud's inappropriate behavior with Doe at the Corn Festival and learned that Doe's parents had discovered Stroud's autographed photographs in Doe's possession. Thus, under the facts construed in the light most favorable to Jane Doe and considering all the information Lankford received about Stroud's relationship with Doe, she has satisfied the first prong of the test with respect to defendant Lankford—knowledge of facts or a pattern of inappropriate sexual behavior by Stroud pointing plainly toward the conclusion that he was sexually abusing Doe.

Doe has also illustrated, in a manner sufficient to survive a summary judgment motion, that Lankford demonstrated deliberate indifference to the offensive acts by failing to take action that was obviously necessary to prevent or stop Stroud's abuse. When certain parents complained about Stroud's favoritism, Lankford suggested that their children were "jealous" of the favorite students. Lankford similarly dismissed the librarian's report of "child molestation." In perhaps the most striking example of his apathy, he responded to Brittani B.'s presentation of the valentine—which he admitted appeared to bear Stroud's handwriting—by transferring *Brittani* (not Jane Doe) out of Stroud's class. He never bothered to discuss the valentine incident with Caplinger, Stroud, Doe, or Doe's parents. He did not record any of these complaints of inappropriate conduct in Stroud's personnel file. He did not take the obvious steps of removing Doe from Stroud's class and directing Stroud to stay away from Doe. Both Stroud and Doe stated that they did not begin having sexual intercourse until late March or early April 1987. A jury could reasonably conclude that had Lankford taken actions that were obviously necessary in response to the valentine—indeed, if he had responded at all—the relationship might have been derailed at that point and the violation of Jane Doe's rights would not have been as severe or prolonged. Thus, Jane Doe has, in a manner sufficient to withstand a motion for summary judgment, stated a

claim under § 1983 that defendant Lankford was deliberately indifferent to his subordinate's violation of her constitutional right to bodily integrity.[13]

With respect to whether defendant Caplinger is immune from this lawsuit, however, the evidence presented tells a different story. The first time Caplinger heard of any potential misconduct by Stroud was when he received the report from Mickey Miller in February 1987. He promptly notified Lankford and instructed him to speak with Stroud about the incident. There is no evidence that Lankford informed Caplinger at that time about Stroud's past behavior, and it is undisputed that Lankford never documented any of the reports he had received about Stroud.

Caplinger did not receive any other reports about Stroud until June 1987, when two parents reported the Corn Festival incident to him. Again, Caplinger promptly responded by contacting the parents of one of the allegedly misbehaving students reportedly at the festival. He was assured that the accused student was not even at the event. We cannot say that Caplinger's decision not to pursue the investigation further, after the parents assured him that their child had not even attended the Corn Festival, exhibited deliberate indifference.

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13. Lankford argues that his conduct, as a matter of law, could not have manifested deliberate indifference to the violation of Doe's constitutional rights because he met with Stroud two times in response to complaints about Stroud's activities. These facts, however, are subject to varying interpretations. A jury could conclude, for example, that one meeting never took place, because Stroud had no memory of it; similarly, a jury might conclude that the other meeting resulted not from Lankford's initiative, but because of Caplinger's involvement. Although Lankford is certainly free to make these arguments at trial, they are unavailing at the state of summary judgment.

Appendix A

When Doe's parents met with Caplinger concerning the photographs of Stroud in July 1987, Caplinger again responded appropriately, if ineffectively, to the situation. He met with Jane Doe privately and questioned her about her relationship with Stroud. He also met with Stroud, verbally reprimanded him about the inappropriate comments on the photographs, warned him to keep his distance from Jane Doe, and informed him of the consequences if the misconduct continued.

Although after the July photograph incident Caplinger had received notice of a pattern of inappropriate sexual behavior sufficient to satisfy the first prong of the test, he certainly did not respond to the misconduct with deliberate indifference. He instructed Lankford to speak with Stroud about the incident at the basketball game; he personally investigated the report concerning the Corn Festival report; and he met with Stroud immediately after learning of the photographs, reprimanded him for his conduct, and unequivocally warned him of the consequences if any further misconduct was reported. His actions were ineffective, but not deliberately indifferent. Summary judgment should have been granted to defendant Caplinger on the grounds of qualified immunity.

IV

EQUAL PROTECTION

The plaintiff also asserts that Stroud's behavior toward her violated her constitutional rights under the Equal Protection Clause of the Fourteenth Amendment. Doe advances three separate equal protection theories, based on two different sorts of behavior. She first argues that the physical sexual abuse to which Stroud subjected her constituted sexual harassment, which she argues is

offensive to the Equal Protection Clause. Second, she contends that Stroud's classroom favoritism toward her also constituted sexual harassment. Finally, she argues that the classroom favoritism constituted the more typical form of disparate gender discrimination, which the Supreme Court has found to be prohibited by the Equal Protection Clause. Following these theories, Doe argues that Caplinger and Lankford should be liable because, as in the case of her due process claim, they were deliberately indifferent to the unconstitutional conduct that caused her injury.

Assuming that Stroud sexually abused Doe, which the defendants do not contest, Stroud violated Doe's substantive due process rights as a matter of law. Doe does not claim that the damages that she could recover from Lankford based on Stroud's alleged violation of her equal protection rights would be any more extensive than the damages that she could recover based on the substantive due process violation. Nor does she argue that, or show how, Caplinger could be supervisorily liable for equal protection violations predicated on Stroud's sexual abuse when he is not supervisorily liable for substantive due process violations involving the same conduct. Consequently, we need not reach the question of whether Doe states an equal protection claim.

V

The sole question before us is the propriety of the district court's denial of qualified immunity to the appellant school officials. The school officials' main argument that the liability of a school official for ignoring a subordinate's sexual abuse of a 15-year old student was not clearly established in 1987.

Appellants, however, agree that by 1987 the Constitution

clearly protected the most hardened criminal inmate from abuse by his guard and imposed liability on the guard's supervisor who was consciously indifferent to such abuse. Similarly, appellants cannot seriously contest that the § 1983 liability of a police chief was not clearly established in 1987 when the chief was consciously indifferent to his officer's physical abuse of a citizen. In short, supervisory liability for deliberate indifference to constitutional violations committed by subordinates was clearly established when the events in this case occurred. Consequently, the school officials' argument that with constitutional immunity they could ignore the teacher/coach's physical sexual abuse of an impressionable 15-year old student is, as a practical matter perverse, and, as a legal matter, not supported by the case law. Such an argument neither legally nor logically makes any sense.

For the reasons stated above, we affirm the district court's order denying qualified immunity to defendant Lankford and reverse the district court's order denying qualified immunity to defendant Caplinger. We also remand this case to the district court for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part and REMANDED.

Appendix A

PATRICK E. HIGGINBOTHAM, Circuit Judge, with whom POLITZ, Chief Judge, joins specially concurring:

The complex and interrelated roles played by state and federal law in Fourteenth Amendment jurisprudence require subtle, often Byzantine, analysis. True to form, the legal basis of this case is complex. Not so true to form, the judgment it demands is simple. This is a case about power and its abuse. The state conferred the power and Stroud abused it. That Coach Stroud exceeded the constitutional limits of his authority, and that Principal Lankford caused a violation of Doe's rights by looking away, are truths too plain to admit of uncertainty, legal or otherwise. We have never understood the Fourteenth Amendment to permit such a misuse of state power. I therefore join the majority opinion.

The majority and dissents divide today over the "law," but that division rests largely on different perceptions of the human condition. We have all looked at the same set of facts and come away with quite different perceptions of what transpired between teacher and pupil. The majority sees an exploitation of power and the dissents see causal sex. Make no mistake about it. This case is not about a high school coach who happened to have an affair with a student. It is about abuse of power.

Our dissenting colleagues lodge carefully drafted and cogent objections, although I remain persuaded that the majority has it "right." With no burden to stitch together an agreement of a majority, a burden well-carried by Judges Jolly and Davis, I am free to engage the dissents by writing separately and to add a gloss to the majority's reasoning.

Appendix A

I.

In *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986), we set out three steps necessary to drawing the circle of liability under 42 U.S.C. § 1983. As we noted, section 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, *or causes to be subjected*, any . . . person within the jurisdiction [of the United States] to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured. . . ." *Viterna*, 795 F.2d at 1204 (citing 42 U.S.C. § 1983) (emphasis and alterations in original). We have interpreted section 1983 to require a court to determine whether a rights violation occurred, whether it occurred under color of state law, and whether the particular state actor or actors before the court caused the violation. *Id.* at 1209.

A

I first ask whether Doe's rights were violated. *Id.* I conclude with the majority that they were. The majority and Judge Garwood's dissent agree today that the Due Process Clause of the Fourteenth Amendment affords Doe a liberty interest in her bodily integrity, protected from certain unwarranted state deprivations. *See Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981). This protection extends to a student's right to be free from corporal punishment in school if arbitrary, capricious, or wholly unrelated to a legitimate state purpose. *Fee v. Herndon*, 900 F.2d 804, 808 (5th Cir.), *cert. denied*, 498 U.S. 908, 111 S.Ct. 279, 112 L.Ed.2d 233 (1990) (citations omitted). The right also protects a fifteen-year old student from a teacher who uses his authority to sordid sexual ends. *See Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 750 (5th Cir. 1993) (acknowledging student's right to be free from sexual abuse by teacher). *See also Jefferson v. Ysleta Indep. Sch.*

Dist., 817 F.2d 303, 305 (5th Cir. 1987) (recognizing student's "right to be free of state-occasioned damage to [the student's] bodily integrity") (citation and internal quotation marks omitted).

Judge Jones argues that a child has no constitutionally protected interest in being free from physical sexual abuse by a teacher who uses his position of authority to seduce her. I respectfully disagree with that result and the methodology behind it. She quotes but does not apply the Supreme Court's pronouncement in *Michael H.* that, "the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint." *Michael H. v. Gerald D.*, 491 U.S. 110, 121, 109 S.Ct. 2333, 2340, 105 L.Ed.2d 91 (1989) (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) and *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923)). We have held that a student has a right to be free from corporal punishment inflicted in a way that is "arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning." *Woodard v. Los Fresnos Indep. Sch. Dist.*, 732 F.2d 1243, 1246 (5th Cir. 1984). The physical sexual abuse here was, then, *a fortiori* a deprivation of Doe's liberty interest. I do not see how Coach Stroud's use of his position of authority to pressure and manipulate Doe into sex could be other than arbitrary and capricious. It served no legitimate state goal. Judge Jones at times appears to recognize our long history of using state and federal law to determine the traditions and conscious of our people.[1] She is correct to do so. The deeper the mark of disapproval

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1. *See* Jones Dissent slip op. at 2899 n. 4 (concurring in Judge Garwood's dissent); *id.* slip op. at 2902 n. 8 ("Although all of the states maintain criminal laws against statutory rape, not all of them set the age of consent at the age of fifteen. In some of the states, the age of consent is lower. This poses an interesting question: has the majority made a constitutional offense of conduct that is some states is not criminal?") (citation omitted).

that state and federal civil and criminal law have placed on Stroud's acts, the stronger the case that Doe's liberty interest is fundamental *See Michael H.*, 491 U.S. at 122, 109 S.Ct. at 2341. Whether a foundation in state and federal laws and their history is either necessary or sufficient for the recognition of a right may be contested, That such a foundation supports recognition of a right is uncontroversial.[2]

Nevertheless, Judge Jones rests her claim that the Constitution does not afford Doe protection in part on the fact that state and federal laws provide Doe a remedy for her complaints. Judge Jones concludes, "The attention that this 'right' has received throughout state and federal statutory and common law demonstrates a history of ordered deliberation and strongly suggests that Doe's right is not 'fundamental' in the sense that Doe needs the additional armature of constitutional common law to protect her." Jones Dissent slip op. at 2902 (footnote omitted). Judge Jones claims that Doe has no

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2. Compare footnote 6 of Justice Scalia's opinion in *Michael H.* in which the Chief Justice joined, 491 U.S. at 127 n. 6, 109 S.Ct. at 2344 n. 6 (arguing that in evaluating a potential liberty interest courts should look "to the most specific level at which a relevant tradition protecting, or denying protection to, [an] asserted right can be identified"), with Justice O'Connor's concurrence in which Justice Kennedy joined, 491 U.S. at 132, 109 S.Ct. at 2346 (approving the use of tradition in explicating the Due Process Clause of the Fourteenth Amendment but rejecting "the most specific level" of generality as the sole appropriate "mode of historical analysis") and Justice Brennan's dissent in which Justices Marshall and Blackmun joined, 491 U.S. at 139, 109 S.Ct. at 2350 (noting that "the historical and traditional importance of . . . interests in our society" informs, but does not dictate, the decision to recognize them as liberty interests). Perhaps the one point of consensus on the Court is that a history of state and federal laws protecting an interest lends credence to the claim that it falls within the protective scope of the United States Constitution. *But cf. Hudson v. McMillian*, __ U.S. __, __, 112 S.Ct. 995, 1010-11, 117 L.Ed.2d 156 (1992) (Thomas, J., dissenting) (noting robust protection of right by state common law in concluding that right is not protected by Eighth Amendment of United States Constitution).

constitutional right because she does not need one; state and federal laws shield her.

The existence of state law protecting an interest does not, however, diminish the force of a claim for constitutional protection. *See Snowden v. Hughes*, 321 U.S. 1, 11, 64 S.Ct. 397, 402, 88 L.Ed. 497 (1944) ("state action, even though illegal under state law, can be no more and no less constitutional under the Fourteenth Amendment than if it were sanctioned by the state legislature"). *See also United States v. Raines*, 362 U.S. 17, 25, 80 S.Ct. 519, 524, 4 L.Ed.2d 524 (1960) ("It makes no difference that the discrimination in question, if state action, is also violative of state law.") (citing *Snowden*). State law may cure a constitutional violation by providing adequate post-deprivation state remedies, but only where the state may at times constitutionally infringe the interest at stake. Justice Powell recognized this distinction in *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). *See Parratt v. Taylor*, 451 U.S. 527, 542-43, 101 S.Ct. 1908, 1916, 68 L.Ed.2d 420 (1981). *See also Fee v. Herndon*, 900 F.2d 804, 808 (5th Cir. 1990); *Woodard v. Los Fresnos Indep. Sch. Dist.*, 732 F.2d 1243, 1245 (5th Cir. 1984).

Justice Powell in *Ingraham* established a two-stage analysis of a student's right to be free from corporal punishment. *See Ingraham*, 430 U.S. at 672, 97 S.Ct. at 1413. First, one asks whether protected interests are implicated. *Id.* at 672-74, 97 S.Ct. at 1413-14. Second, one asks whether the person who suffered the deprivation was accorded due process of law. *Id.* at 674-82, 97 S.Ct. at 1414-18. At the second stage the existence of protective state and federal law undermines, rather than supports, the conclusion that a due process violation has occurred. Only after we have recognized a fundamental liberty interest do we look to state law to see if an infringement of that interest has occurred without due process. *See id.* at 672, 97 S.Ct. at 1413.

Appendix A

Justice Powell noted in *Ingraham*, "Were it not for the common-law privilege permitting teachers to inflict reasonable corporal punishment on children in their care, and the availability of the traditional remedies for abuse, the case for requiring advance procedural safeguards would be strong indeed." *Id.* at 674, 97 S.Ct. at 1414 (footnote omitted). As the state never has a legitimate basis for inflicting physical sexual abuse on a child, no set of procedural safeguards whether available before or after such a violation would meet the requirements of due process. Justice Powell's reasoning in *Ingraham* supports this conclusion: "If the common-law privilege to inflict reasonable corporal punishment in school were inapplicable, it is doubtful whether any procedure short of a trial in a criminal or juvenile court could satisfy the requirements of procedural due process for the imposition of such punishment." *Id.* at 674 n. 44, 97 S.Ct. at 1414 n. 44 (citations omitted).

Unlike in the case of corporal punishment, even "a trial in a criminal or juvenile court" prior to the infliction of physical sexual abuse on a child would not meet the requirements of due process. As physical sexual abuse of a student is never warranted, no process suffices to vitiate the rights violation such abuse involves. While state law vindicating Doe's liberty interest may comfort, it offers no basis for concluding that her interest is not fundamental or that her rights were not violated. There are powerful arguments that 42 U.S.C. § 1983 was not intended to reach episodic acts not sanctioned by state law or custom. Nevertheless, the Supreme Court rejected that reading in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) and we are not free to adopt it.

B

The next inquiry is whether the deprivation of liberty occurred under color of state law. I agree that it did. Stroud's official

interactions with Doe and his sexual involvement with her together constituted an indivisible, ongoing relationship. The special attention Stroud gave Doe *as her teacher* afforded him the opportunity to exert his influence. He levered his authority to press upon Doe his sexual desires, while both on and of school grounds. He treated Doe differently than he treated other members of his class. He gave her good grades, required of her less work than other students, and allowed her to behave as she liked in his classroom. This manipulative course was an abuse of power conferred by the state. I am persuaded that Stroud acted under color of state law.

Judge Garwood's dissent commendably recognizes the relevance of this inquiry but contests this conclusion, relying on *D.T. v. Independent Sch. Dist.*, 894 F.2d 1176 (10th Cir.), *cert. denied*, 498 U.S. 879, 111 S.Ct. 213, 112 L.Ed.2d 172 (1990), where a school coach was held not to have acted under color of state law when engaging in sexual activity with students. *Id.* at 1192. Unlike the defendant in *D.T.*, however, Stroud was Doe's teacher before, during, and after their sexual liaison. *See id.* at 1191 (emphasizing that teacher was on vacation when molestation occurred in reaching conclusion that he did not act under color of state law).

The importance of Stroud's position as Doe's teacher becomes clearer when one considers Judge Garwood's contention that Stroud did not exchange formal rewards for sexual favors from Doe. From that factual premise Judge Garwood suggests that Stroud may not have acted under color of state law. Judge Garwood's contention is tenable but not persuasive. The approval which Stroud conferred on Doe is both one of the most common and one of the most effective tools employed by teachers in affecting the behavior of their students. It is precisely this use by Stroud of his position of authority to which I point. The very

official nature of this attention facilitated his efforts—and indeed enabled him—to violate her rights.

Judge Garza's dissent takes Judge Garwood's view one step further. He argues that a state actor must exercise state authority, and not merely act in an official position, before the courts will recognize action under color of state law. Again, the Supreme Court has rejected this approach. In *Monroe*, the Court dismissed the notion that " 'under color of' enumerated state authority excludes acts of an official or policeman who can show no authority under state law, state custom, or state usage to do what he did." *Monroe v. Pape*, 365 U.S. at 172, 81 S.Ct. at 476.

Judge Garza, however, offers a subtle distinction. To find that action in violation of state law remains under color of state law, Judge Garza would require an exercise of otherwise legitimate authority granted by the state that extends beyond permissible limits. A state may authorize searches and seizures, for example, while a police officer nevertheless violates the Constitution by exceeding that authority. Under this view, violating state law while in the pursuit of an endeavor generally approved by the state may amount to violating the Constitution under color of state law.

The problem under this approach becomes one of characterization. It defines the relevant conduct of the state officers in *Monroe* as excessive conduct in performing a search and seizure. The argument continues that because the state authorizes officers to perform searches and seizures, the officers acted under color of state law. *See* Garza Dissent slip op. at 2910-11. Judge Garza contrasts this rights violation with Stroud's treatment of Doe. Stroud had no authority, Judge Garza reasons, to inflict physical sexual abuse on Doe. From this fact, Judge Garza concludes that Stroud did not act under color of state law.

The parallel between Stroud's actions and those of a lawless police officer are closer than Judge Garza's dissent acknowledges. Consider, for example, *United States v. Price,* 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966), in which several police officers and private citizens murdered three civil rights workers after their release from a Mississippi jail. The Court found not only that the officers acted under color of state law, but also that the private citizens "were participants in official lawlessness, acting in willful concert with state officers and hence under color of law." *Id.* at 795, 86 S.Ct. at 1157. The officers and the private citizens exercised no legitimate authority. Their motivations were racist and therefore based on private hatred. Moreover, there are not circumstances in which the police may permissibly act as judge, jury, and executioner, and none in which private citizens may play these roles. Yet the Supreme Court's decision in *Price* requires a finding of an abuse of state authority. The decision, therefore, keeps us from confining abuse of state authority to situations where state actors pursue legitimate ends. Of course, Stroud's actions are of a different order than the stunning execution of three young civil rights workers by officers and private citizens in *Price,* but his actions nevertheless were an abuse of state authority, as I have explained.

C

Finally, I identify the state actors responsible for the violation. *See Viterna,* 795 F.2d at 1209. By definition, the deprivation of a federally protected right as defined by federal standards creates a federal claim. *Id.* Nevertheless, state law is often a source in explicating violations of federal rights. Most familiar, perhaps, is our drawing on state law to determine whether a claimant had a property right protected by the Due Process Clause of he Fourteenth Amendment. *Id.* (citing *Cleveland Board of Education*

v. Loudermill, 470 U.S. 532, 537, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985) and *Shelton v. City of College Station*, 780 F.2d 475, 482 (5th Cir.), *cert. denied*, 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566 (1986)). State law allows us "to identify the persons responsible for [the] identified civil rights violation." *Id.* State law is of course implicit in the conclusion that the state vested the coach with the authority he abused. State law is more obviously at work when we move beyond the immediate actor. To put the matter differently, state law guides us in circling state actors who fairly can be said to have caused Doe to be subjected to the rights violation. Caution is necessary because section 1983 imposes liability only upon persons who cause a deprivation; state law does not, in other words, furnish a theory of vicarious liability. Rather, it locates the actors—the persons. *Lopez v. Houston Indep. Sch. Dist.*, 817 F.2d 351, 355 (5th Cir. 1987). A supervisor who might have acted, but did not, cannot be found liable under section 1983 for that reason alone. Under most circumstances, the supervisor could have prevented or stopped the rights violation in some way. *See City of Canton v. Harris*, 489 U.S. 378, 392, 109 S.Ct. 1197, 1206, 103 L.Ed.2d 412 (1989) ("In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident."). Thus, if inaction sufficed as the basis for a suit under section 1983, the supervisor would effectively be vicariously liable.

The Supreme Court has adopted a standard for determining when a failure to act amounts to "a 'deliberate' or 'conscious' choice by a municipality." *Id.* at 389, 109 S.Ct. at 1205. The Court requires deliberate indifference. *Id.* (citing *Monell v. Department of Social Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978) and *Polk County v. Dodson*, 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981)). Where a

municipality's inaction demonstrates deliberate indifference toward the rights of an individual, the municipality commits an act of omission. Its failure to act rises to the level of a conscious or deliberate choice. *Id. See also Gonzalez v. Ysleta Indep. Sch Dist.*, 996 F.2d 745, 757 (5th Cir. 1993) (applying deliberate indifference standard).

The majority recognizes that we apply the same standard to supervisors. A supervisor who acts with deliberate indifference by failing to train or oversee his subordinates may be held liable under section 1983. *See, e.g., Hinshaw v. Doffer,* 785 F.2d 1260, 1262-66 (5th Cir.1986) (applying this standard to police chief who allegedly failed to train and supervise police officer). *See also Lopez,* 817 F.2d at 355 (finding that bus driver may be liable for acting with "callous indifference" in failing to supervise students properly). An omission that evinces deliberate indifference toward the violation of an individual's constitutional rights may amount to an act that causes the violation. *Lopez,* 817 F.2d at 355; *Hinshaw,* 785 F.2d at 1263. Lankford, the principal at Stroud and Doe's school, demonstrated such deliberate indifference.

Time and again Lankford ignored Stroud's inappropriate conduct with students. Lankford did not investigate reports and allegations of Stroud's indecent behavior with any rigor. Neither did Lankford warn or discipline Stroud. On the other hand, as the majority notes, the same cannot be said of Caplinger, the superintendent. Caplinger took action when he became aware that Stroud might have been acting improperly. His response was limited, but so were his grounds for questioning Stroud's actions. Caplinger had less information than Lankford, and thus his ineffective actions do not suggest the same callous attitude. I agree, therefore, that Lankford could be held liable under section 1983 and that Caplinger cannot be.

Nevertheless, in reaching this conclusion the majority skips the potentially determining role of state law at this point in the analysis. So far we have assumed that the state placed Lankford and Caplinger in the role of supervisors. As a result, an egregious failure to fulfill their obligation to oversee Stroud's behavior would amount to action on their part. The state may, however, impose a greater obligation. It may saddle a state official with a specific duty to police the risk of unconstitutional acts by others.

In *Bush v. Viterna*, we considered whether the state imposed such an affirmative duty on the Texas Commission on Jail Standards. A class of inmates in Texas county jails sued under section 1983 asking a district court to compel the Commission to improve conditions in the county jails. 795 F.2d at 1204. In rejecting the prisoners' claim, we looked to state law to identify the person or persons responsible for maintaining the jails. We found that state law placed the county sheriffs and commissioners courts, not the Commission, in charge of the jails. *Id.* at 1206. Our analysis suggests that had the state imposed on the Commission an obligation to maintain the county prisons, the Commission's failure to fulfill that obligation would have been treated as a deliberate or conscious choice. If that omission had resulted in the violation of a federal right through state action, the Commission would have been properly identified as a "state . . . actor responsible for causing the wrong." *Id.* at 1209.

We adopted the same approach to gauge the liability of a supervisor in *Howard v. Fortenberry*, 723 F.2d 1206 (5th Cir.1984), in which two prisoners died after being left in an oppressively hot isolation cell for almost fifteen hours. *Id.* at 1209. We relied on state law to identify the actors responsible for ensuring that the prison did not employ this illegal form of punishment. State law placed an affirmative duty on certain prison

officials to inspect the prison facilities. *Id.* at 1213. The court reversed the district court's summary judgment in favor of these defendants, and remanded for the district court to determine their liability. *Id.* at 1214. *See also Miller v. Carson*, 563 F.2d 757, 760 n. 7 (5th Cir. 1977) ("when a state official's violation of state law causes [a constitutional violation], a federal cause of action arises under 1983") (citation omitted); *Sims v. Adams*, 537 F.2d 829, 831-32 (5th Cir. 1976) (holding that cause of action exists under section 1983 where mayor and police chief may have had obligation under state law to supervise policeman with alleged history of racial violence).

I would first look to state law to determine the nature of Lankford and Caplinger's obligations as Stroud's supervisors. In particular, I would ask whether the state required Lankford or Caplinger to take specific action upon learning that Stroud may have been sexually abusing his students. Texas places on a school principal the duty to discipline; it also places the principal under the supervision of the superintendent in disciplinary matters. Tex.Educ.Code § 21.913(a)(1) (West 1994). The principal is responsible for "submitting recommendations to the superintendent concerning assignment, evaluation, promotion, and dismissal of all personnel." Tex.Educ.Code § 21.913(a)(2) (West 1994). As a result, the general obligations of supervision attach to the positions of principal and superintendent. Texas law does not, however, make special provision for the appropriate response of a principal or superintendent to evidence of teacher misconduct. Consider a classroom teacher in the same school as Coach Stroud who had full knowledge of Coach Stroud's activities but looked the other way. Any moral duty aside, no one suggests that § 1983 imposes liability upon this silent teacher. This conclusion is found in the role of state law.

In other contexts, the legislature has placed such an obligation to take affirmative action on principals. Section 21.303 of the Texas Education Code, for example, requires a principal to report, or to supervise a subordinate who will report, to the local police department reasonable grounds for suspecting the occurrence of any of several crimes in school, on school grounds, or at school-related functions. These activities include parole violations, possession of illegal drugs or lethal weapons, and involvement in organized crime. Tex.Educ.Code § 21.303(a)(1-4) (West 1994). The state legislature could have imposed a similar requirement on principals to investigate or report evidence suggesting that a teacher is involved sexually with a student. Had the legislature done so, Lankford's passivity would have been inconsistent with this duty, irrespective of whether he acted with deliberate indifference. Under such circumstances, state law would support the conclusion that Lankford caused Doe to be subjected to a rights violation at the hands of Stroud.

There is no such specific obligation under Texas law and application of the deliberate indifference standard was appropriate. I therefore join the majority's judgment, accepting Defendant Caplinger's and rejecting Defendant Lankford's assertion that he is entitled to qualified immunity as a matter of law. I agree that the school principal must on these facts take his case to a jury. A jury may ultimately not be persuaded that Lankford acted with the requisite level of indifference. I am not prepared to find its absence as a matter of law.

II.

Implicit in the rejection of Lankford's assertion of qualified immunity is the conclusion that his legal duty was certain when breached. I find nothing in our cases to comfort the principal. The

certainty of the illegality of his failure is a direct reflection of the certainty that the abuse by the coach was itself illegal under both state and federal law. If it is true that Lankford was a cause of the coach's abuse of power because he knew and was indifferent to the occurrence, there is no room for "legal" uncertainty. In every practical sense of the word this school principal was a cause of the wrong. The assertion that his "duty" to do anything was uncertain is unconvincing.

Justice Scalia pointed out in *Anderson v. Creighton,*[3] the hazards of framing the legal question at too great a level of generality. The error can be made in the opposite direction—a search so narrowed that legal nuance rises to uncertainty and ultimately confounds common sense. Qualified immunity reflects the judgment that an official ought not to be mulcted for choices made that only later prove to have been "illegal." I don't think we today put any school principal in peril or unfairly second guess this one. This was not an episodic act of an interloper to the school scheme nor the private act of a student. Rather, it was the persistent pattern of indefensible conduct of a school official, the principal's subordinate.

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3. 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

Appendix A

GARWOOD, Circuit Judge, with whom EDITH H. JONES, JERRY E. SMITH, BARKSDALE, EMILIO M. GARZA and DeMOSS, JJ., join, dissenting in part:

I dissent from so much of our judgment as affirms the denial of Lankford's motion for summary judgment on the basis of qualified immunity.[1]

So far as concerns Lankford, this is a pure non-feasance case. His inaction was deplorable. He was indecisive, insensitive, inattentive, incompetent, stupid, and weakkneed. But it was not then clearly established and, indeed, is not even now—that mere inaction on his part violated the United States Constitution. Lankford, a public high school principal whose position unquestionably involved the exercise of discretion, was accordingly entitled to qualified immunity, as he asserted in his motion for summary judgment. The burden then shifted to the plaintiff "to rebut this defense by establishing that the official's allegedly wrongful conduct [here, inaction] violated clearly established law." *Salas v. Carpenter,* 980 F.2d 299, 306 (5th Cir. 1992). We do "not require that an official demonstrate that he did not violate clearly established federal rights; our precedent places that burden upon plaintiffs." *Id.*

Moreover, it is settled that an official's violation of *state* law—no matter how clearly established and plain to one in his position—does not deprive him of section 1983 qualified immunity if under the circumstances it was not clearly established that his conduct violated the *federal* right sued on. *Davis v. Scherer,* 468 U.S. 183,193-95,104 S.Ct. 3012, 3019-20, 82 L.Ed.2d 139

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1. I concur in the holding that appellant Caplinger, the superintendent, was entitled to qualified immunity.

(1984). Further, the federal right must have been clearly established in a sufficiently "particularized" sense so that it was then "clear that a reasonable official would understand that *what he is doing* violates that right." *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987) (emphasis added). *See also, e.g., Barts v. Joyner*, 865 F.2d 1187, 1194 (11th Cir. 1989) ("*Harlow*'s 'clearly established' standard demands that a bright line be crossed. The line is not to be found in abstractions—to act reasonably, to act with probable cause, and so forth—but in studying how these abstractions have been applied in concrete circumstances."); *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir.1987) ("whether the law was clear *in relation to the specific facts confronting the public official* when he acted") (emphasis added).[2] Finally, as Judge King recently observed in a state actor's qualified immunity case with at least equally shocking facts, "[t]hat the actions of which Doe complains are egregious, however, does not mean that he has asserted the violation of a federally protected right, as required by 42 U.S.C. § 1983." *Doe v. State of La*, 2 F.3d 1412, 1421 (5th Cir. 1993) (concurring opinion).

Coach Stroud used, and abused, his position as a teacher to worm his way into the affections of his fifteen-year-old student Jane Doe so that, as the majority says, "she developed a 'crush' on Stroud." As the majority relates, by late fall 1986 Stroud and Doe engaged in "kissing and petting," and in January 1987 their relationship "escalated to heavy petting and undressing" following

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2. *See also, e.g., KH. Through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) (although to defeat qualified immunity, a plaintiff need not "point to a previous case that differs only trivially from his case," nevertheless "[i]t is not enough, to justify denying immunity, that liability in a particular constellation of facts could have been, or even that it was, predicted from existing rules and decisions. . . . Liability in that particular set [of facts] must have been established at the time the defendant acted.").

an evening rock concert to which Stroud took Doe and some of her friends, including Stroud's daughter, also a student at the school. Doe befriended Stroud's daughter in order to have "a cover" for her relationship with Stroud and "an excuse" for visiting at the Stroud residence.[3] Apparently commencing in February 1987, Doe, with her parents' knowledge and consent, frequently spent the night or weekend there, ostensibly visiting Stroud's daughter. Stroud would kiss Doe on these occasions, and suggest that they have intercourse. Doe refused until, on the occasion of a visit at Stroud's residence in late March or early April 1987, when, as the panel opinion says, "she 'gave into' Stroud . . . sensing that Stroud was getting mad at her for not having sex with him; she was afraid of losing their friendship altogether." 975 F.2d 137 at 140. Thereafter, Doe continued to frequently visit at the Stroud home, and to engage in sexual intercourse with him there. She also began to sneak out of her house in the middle of the night to meet Stroud, and on these occasions they would go out into the country, or into the school field house, and engage in sexual intercourse. The panel opinion explains that "Doe was reluctant to refuse Stroud's sexual advances out of fear that he would alienate her completely." *Id.*

The majority concludes that by 1987 it was clearly established that public school children "have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment" — more precisely, "the substantive due process component of the Fourteenth Amendment" — against "physical sexual abuse by a school employee." Expressed at this level of generality, and assuming a not unduly broad definition of "physical sexual abuse," I agree, *provided* the employee's offending action is taken "under color of" state law. *Cf. D.T. by M.T. v. Independent School District No. 16,* 894 F.2d 1176 (10th

3. Doe also had a "cover" boyfriend, a fellow student at the school.

Cir.), *cert. denied*, 498 U.S. 879, 111 S.Ct. 213, 112 L.Ed.2d 172 (1990).[4]

Just what sort of actions by Stroud violated this right of Doe? The majority opinion is not entirely clear, but seems to say that it is the sexual intercourse and related fondling. Thus, the majority says "the Constitution protects a schoolchild from physical sexual abuse — here, sexually fondling a fifteen-year-old schoolgirl and statutory rape — by a public schoolteacher." I agree that in 1987 it was clearly established that, where sufficiently immature children are involved, *consensual* sexual relations or fondling of private parts by an adult amounted to "physical sexual abuse" for these

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4. *D.T.* involved sexual molestation on June 13 and 14, 1984, by Epps, a teacher employed by the defendant school district, of three boys (ages 11, 11, and 13) who had been in Epps' fifth grade class at a district school, and had been on the school's fifth grade basketball team coached by him, during the school term that ended at the end of May 1984. The molestation occurred when the boys, with their parents' permission, accompanied Epps, staying at his home overnight, to sell candy to raise funds for a forthcoming basketball camp that was to be operated and directed that summer by another coach of the district and was to be held on school district property. The school district had approved the use of its facilities for the camp, permitted distribution at its schools to students there of fliers and notices concerning the camp, and consented to the use of a school basketball court for fund raising activity for the camp. The school district, however, did not sponsor, organize, or manage the camp. Epps was under contract with the school district and was paid for the summer months, but had no teaching, coaching, or other duties or functions to perform for the school district during June or July 1984, and would not come back on duty until August 1984. Suit was brought on behalf of the children under section 1983 against the school district on the ground, *inter alia*, that it hired Epps with knowledge of or deliberate indifference to the fact that he was a homosexual with a proclivity to molest young boys, and that his hiring was the moving force behind the sexual abuse. The Tenth Circuit reversed a judgment on the jury's verdict for the plaintiffs, holding that as a matter of law "there was no state action involved when the plaintiffs were molested by Epps" and "Epps was not acting under color of state law when he molested the plaintiffs." *Id.* at 1192.

purposes. However, for that to be actionable under section 1983, not only must the consenting child have been sufficiently immature, but also the physical sexual abuse must have been under color of state law.

It is not clearly established that age fifteen is, *per se*, sufficiently immature.[5] Plainly Doe was of a sufficient age to bear

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5. This is so whether one focuses on the sexual intercourse or the sexual fondling.

In Texas, for statutory rape the child must be "younger than 17 years of age." TEX. PENAL CODE § 22.011(c)(1). *See also id.*, § 22.011(a)(2). However, in Louisiana Doe would have attained the age of consent for purposes of statutory rape and related offenses. *See* La.Rev.Stat. 14:43.1 (sexual battery; "where the other person has not yet attained fffteen years of age and is at least three years younger than the offender"); 14:43.3 (oral sexual battery; same); 14:42A(4) (aggravated rape "when the victim is under the age of twelve years"). In several other states, also, Doe would have attained the statutory rape age of consent. *See* MODEL PENAL CODE § 213.1, comment 6 at 323-325 (American Law Institute 1980); 65 AM.JUR.2D *Rape* § 17 ("The age of consent has been fixed at ages varying from 10 to 18 years."). At common law the age of consent was ten. See MODEL PENAL CODE § 213.1, comment 6 at 323. The MODEL PENAL CODE uses age ten for statutory rape, *id.* §§ 213.1(1)(d), 213.2(1)(d), and age sixteen for the lesser felony of "Corruption of Minors and Seduction," *id.* § 213.3(1)(a) (sexual intercourse with one less than sixteen years old where the actor is at least four years older) and for the misdemeanor of "Sexual Assault" ("touching . . . the sexual or other intimate parts . . . for the purpose of arousing or gratifying sexual desire"; where the victim is less than sixteen years old and the actor is at least four years older). *See also* 18 U.S.C. § 2241(c) ("sexual act with another person who has not attained the age of 12 years"); § 2243(a) ("sexual act with another person who—(1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the" offender); § 2244(a) ("sexual contact" an offense, with lesser penalty, where "sexual act" would be punishable under §§ 2241 or 2243); § 2245(2) ("sexual act" defined) & (3) ("sexual contact" defined as "touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks" with harassing or sexual

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children. Perhaps that should not be the test and instead arguably a minimum age of sixteen, seventeen, or eighteen would make sense as a bright line for these purposes. But that is not, and was not, clearly established (see note 5, *supra*).

Nor is it clearly established that Stroud's physical sexual abuse of Doe was under color of state law. The physical sexual abuse principally relied on by the majority here is the sexual intercourse, and this not only was all consensual, but also took place clearly outside of school hours and not as even a purported part of any school activity. The same is true of the "sexually fondling" or "heavy petting and undressing." [6] None of any of this could be said to even colorably be within the course or scope of Stroud's employment.[7] Nor was Doe's participation in this sexual

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intent). The common law did not recognize consensual sexual battery of a minor, but in 1861 by act of Parliament the defense of consent was disallowed "for assaults upon children under the age of 16. MODEL PENAL CODE § 213.4, comment 1.

At common law, the age of consent for marriage was fourteen for males and twelve for females. 52 AM.JUR.2D *Marriage* § 14; 55 C.J.S. *Marriage* § 111. In Texas for many years it was the law that, notwithstanding the statute that precluded issuance of a marriage license without parental consent where the male was under twenty-one or the female was under eighteen, "males over sixteen and females over fourteen may lawfully enter into a contract of marriage," and that lack of parental consent as called for by referenced licensing statute did not render marriage by a male over sixteen and a female over fourteen "voidable, or invalid in any respect." *Williams v. White*, 263 S.W.2d 666, 668 (Tex.Civ.App. — Austin 1954; n.r.e.).

6. And certainly Lankford was not on any notice otherwise.

7. *See, e.g., City of Green Cove Springs v. Donaldson*, 348 F.2d 197 (5th Cir. 1965), where we held that a police officer's rape of an arrestee, shortly following completion of his arrest of her, was not within the scope of his employment. We observed, citing authorities from many jurisdictions:

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activity some sort of "*quid pro quo*" for scholastic or other official favors from Stroud, but was rather because she had "developed a 'crush' on Stroud" and did not wish to risk "losing their friendship altogether." [8] This is not to say that Stroud did not use and abuse his position as a teacher, and thus arguably act under color of law, in initially causing Doe to develop a "crush" on him and in worming his way into her affections. But this is not the constitutional wrong that the majority holds that Doe has suffered and for which Lankford lacks qualified immunity; that wrong, the "physical sexual abuse—here, sexually fondling a fifteen-year-old schoolgirl and statutory rape," came later, albeit doubtless in some sense as an ultimate result of the former conduct. Does the causal connection between the earlier "under color of law" conduct and the later otherwise purely personal and consensual relationship between this fifteen-year-old girl and Stroud cause the latter conduct to also be "under color of law"? [9] In my view, an

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> "It is generally held that liability for an assault by an employee that bears no relation to the real or apparent scope of his employment or to the interest of his employer is not imposed upon the employer under the doctrine of respondeat superior." *Id.* at 202.

This is likewise the law of Texas, *Smith v. M System Food Stores*, 156 Tex. 484, 297 S.W.2d 112 (Sup.1957), as we recognized in a recent holding that a police officer's post-arrest sexual assault of the arrestee was not within the scope of his employment. *McLaren v. Imperial Casualty Co.*, 968 F.2d 17 (5th Cir.1992) (table: unpublished opinion), *cert. denied*, __ U.S. __, 113 S.Ct. 1269, 122 L.Ed.2d 665 (1993), *affirming*, 767 F.Supp. 1364 (N.D.Tex. 1991).

8. Again, Lankford clearly was not on any notice otherwise.

9. For example, in the *D.T.* case, see note 4 *supra*, the prior teacher/coach — student/player relationship was doubtless a causative factor in the teacher/coach's

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affirmative answer to that question is not and was not clearly established as a matter of constitutional law.[10]

I turn now to particularly consider the basis on which the majority holds that Lankford has failed to establish his entitlement to qualified immunity.

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ability to molest the students within a couple of weeks after the end of the school term in which he had taught and coached them, but his actions were nonetheless held not to be under color of law.

10. The special concurrence takes the view that Stroud acted under color of state law in that "[t]he special attention Stroud gave Doe *as her teacher* afforded him the opportunity to exert his influence. . . . He gave her good grades, required of her less work than other students, and allowed her to behave as she liked in his classroom." As the majority puts it, "all of this attention flattered Doe, and she developed a 'crush' on Stroud." However, as noted in the text, even though Stroud may have acted under color of law in causing Doe to develop a "crush" on him, *that* did not invade or violate her constitutional liberty interest in "bodily integrity" or to be free from "physical sexual abuse." Certainly there was—and— is—no clearly established law to the contrary. The invasion of bodily integrity here the intercourse and sexual fondling was not a *quid pro quo* for official favoritism from Stroud (and neither the majority nor the special concurrence claim otherwise), but was consensual *if* Doe was competent to consent to such conduct. Contrary to the implication of the special concurrence, Doe's age is hence highly relevant, indeed crucial, and it cannot be clearly established that Stroud's "physical sexual abuse" was under color of law merely because it was an eventual outgrowth of the "crush." No even remotely analogous decision is cited even tending to support such a holding. The approach of the special concurrence would necessarily find a constitutional invasion in the state college professor-adult student setting where the teacher abused her official position to cause the student to develop a "crush" on her and as an eventual result the two later had consensual sexual relations while the college was in session. Surely it is not clearly established that such wholly consensual sexual relations are under color of law or a violation of the adult student's right to bodily integrity. We have turned the concept of "clearly established" on its head.

Appendix A

The majority (fn. 3) does *not* take the position that school officials have "an affirmative duty to protect students from Constitutional violations" arising out of a "special relationship" between the state and the students in its public schools analogous to that existing between the state and those in its institutional custody, such as prisoners, as discussed in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195-98, 109 S.Ct. 998, 1003-1005, 103 L.Ed.2d 249 (1989). Certainly, no such principle can be regarded as clearly established.[11]

Notwithstanding this disclaimer of a "special relationship" affirmative duty, the majority proceeds to impose on Lankford an affirmative duty—not to fail with deliberate indifference to act—of the very same kind imposed in favor of prisoners on prison supervisors, respecting protection not only from other inmates, but also from the actions of guards and from various conditions of confinement. *See Wilson v. Seiter*, __ U.S. __, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991).

The majority's decision as to Lankford is *not* grounded on the assumption that the evidence supports a finding that Lankford took any action or did anything affirmative that played any part in causing Stroud's physical sexual abuse of Doe. The majority does not contend that Stroud's physical sexual abuse of Doe came about because Stroud had received Lankford's tacit or implied approval

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11. Post-*DeShaney*, at least three circuits have held that the public school setting does not give rise to a "special relationship" imposing a due process affirmative duty to protect students. *See Maldonado v. Josey*, 975 F.2d 727, 730-733 (10th Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 1266, 122 L.Ed.2d 662 (1993); *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1371-72 (3d Cir. 1992) (en banc), *cert. denied*, __U.S. __, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993); *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990).

of such conduct.[12] Indeed, the three-part test that the majority devises to determine personal liability of supervisors contains no element of affirmative conduct, communication of condonation or authorization, or the like on the supervisor's part. Such a test, applied outside of the "special relationship" context, is essentially inconsistent with the Supreme Court's decision in *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). The Third Circuit so held in *Chinchello v. Fenton*, 805 F.2d 126, 133 (3rd Cir.1986), stating:

> "In *Rizzo v. Goode*, 432 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), the Supreme Court addressed and rejected the argument that a supervising public official has an affirmative constitutional duty to supervise and discipline

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12. I note that there is no evidence Stroud's earlier unduly familiar conduct with other female students ever involved physical sexual abuse. The majority does not contend that there is any evidence that, apart from Jane Doe, Stroud ever violated any student's constitutional due process right to be free from physical sexual abuse.

The majority does refer to the May 1986 incident in the darkened library copy room when the librarian observed "Stroud lifting the female students onto a table and catching them as they jumped off of the table into his arms." While the librarian may have used the term "child molestation" in discussing this incident with Stroud, her testimony was not that she thought Stroud was sexually molesting the students; she rather stated "I just thought he was being too playful with them, I guess, in a wrong way." The majority also notes evidence that on or about the same day in October 1987 that Caplinger suspended Stroud, another female student reported to her mother, who advised Caplinger, that "Stroud had grabbed the student's buttocks in class that day." There is no evidence of the truth of this allegation and, in any event, it relates to a matter well after the fact.

Further, there is no evidence that any School District official or employee other than Stroud ever engaged in physical sexual abuse of any student.

so as to prevent violations of constitutional rights by his or her subordinates. It held that even where a pattern of constitutional violations by subordinates is shown, supervising officials do not violate the constitutional rights of the victims of such misconduct unless they have played an '*affirmative part*' in that misconduct. *Id.* at 377, 96 S.Ct. at 607.

* * *

In *Commonwealth of Pennsylvania v. Porter*, 659 F.2d 306 (3d Cir.1981), *cert. denied*, 458 U.S. 1121, 102 S.Ct. 3509, 73 L.Ed.2d 1383 (1982), this court, sitting *in banc*, again addressed the issue of whether there is an *affirmative* constitutional *duty* to supervise. . . . We held that to be legally responsible, supervising officials 'must have played an *affirmative role* in the deprivation of the plaintiffs' rights,' noting that 'the officials' misconduct *cannot be merely a failure to act.*' 659 F.2d at 336. Because 'the Council members' official actions constitute[d] *no more than inaction and insensitivity*,' 659 F.2d at 337, we concluded that they had not violated the plaintiffs' rights *despite their knowledge* of a pattern of misconduct by one of their subordinates."

. . . *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008, 102 S.Ct.

> 1646, 71 L.Ed.2d 876 (1982) . . . held, once again, that while supervising public officials may not in any way authorize, encourage, or approve constitutional torts, they have *no affirmative* constitutional *duty to* train, *supervise* or discipline so as to prevent such conduct.
>
> It is true . . . that some Courts of Appeals have been more willing than ours to infer supervisory approval of unconstitutional conduct from inaction on the part of the supervisor. . . . The courts taking this view, however, have found liability only where there are *both* (1) contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents, *and* (2) circumstances under which the supervisor's inaction could be found to have *communicated a message of approval* to the offending subordinate." (Footnote omitted; emphasis added).

The Third Circuit reaffirmed the *Chinchello* analysis of *Rizzo* and its progeny in *Brown v. Grabowski*, 922 F.2d 1097, 1119-1120 (3d Cir. 1990), *cert. denied* __ U.S. __ , 111 S.Ct. 2827, 115 L.Ed.2d 997 (1991).

Contrary to the implication in the majority opinion, the same principles were affirmed by the Third Circuit in *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3rd Cir. 1989) *(Stoneking II), cert. denied*, 493 U.S. 1044, 110 S.Ct. 840, 107 L.Ed.2d 835 (1990), although the panel split as to their application

to the particular facts in that case. *Stoneking II* was a suit by a female public school student complaining that the school's band director, Wright, "used physical force, threats of reprisal, intimidation and coercion . . . to force her to engage in various sexual acts" some of which "occurred in the band room at the school and on trips to band functions." *Id* at 722. The Third Circuit majority held that Smith, the school principal, and Miller, the assistant principal, were not entitled to summary judgment on the basis of qualified immunity, but that the superintendent of the school district, Shuey, was entitled to summary judgment on that basis. Reviewing *Rizzo*, *Chinchello*, and related cases, the majority summed up the relevant law as being that "although the mere failure of supervisory officials to act or investigate cannot be the basis of liability," nevertheless "such officials may not with impunity maintain a custom, practice or usage that communicated condonation or authorization of assaultive behavior." *Id.* 882 F.2d at 730.[13] The panel majority concluded that there was sufficient evidence for a jury to find that affirmative conduct and policies of Smith and Miller "amounted to a communication of condonation" to Wright and that there was an "affirmative link" between the plaintiff's "injury and policies and practices that Smith and Miller employed and *affirmative acts* they took in furtherance of them." *Id.* at 731 (emphasis added).[14] On the other hand, Superintendent

13. The dissent did not disagree with these principles, but felt that their application to the particular facts there warranted summary judgment in favor of all the individual supervisor defendants. *Id.* at 731-32.

14. The evidence relied on included testimony by female student and band member Judith Grove Showers that she was "sexually assaulted by Wright in 1979 and reported the incident to Miller and Smith" and that Smith told her it was her fault. *Id.* at 727. She and her father further testified that thereafter Miller presented her "with the option of recanting her story in front of the band or withdrawing from all band activities . . . the band was assembled and she was called before it for this purpose, but fled from the room in tears." *Id.* at 728. The Third Circuit observed:

(Cont'd)

Shuey was entitled to summary judgment because the case against him amounted to "mere 'inaction and insensitivity' on his part" and the court could not "discern from the record any *affirmative acts by Shuey* on which Stoneking can base a claim of toleration, condonation or encouragement of sexual harassment by teachers." *Id.* at 731 (emphasis added).

Similarly, in *J.O. v. Alton Community Unit School Dist. 11*, 909 F.2d 267 (7th Cir. 1990), the court considered a section 1983 complaint against supervisory public school officials, including the principal and superintendent, alleging that one Lester Mann "sexually molested" the plaintiff school children "while employed as a teacher" at their school. *Id.* at 268. The complaint proceeded

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(Cont'd)

> "As the district court noted, it could be inferred that 'the "forced apology" served as a trump card in the hands of Edward Wright,' who could threaten his other victims with similar treatment if they reported his actions, . . . and Stoneking in fact testified that she did not report Wright's assaults because 'I knew about Judy Grove and what happened.' " *Id.*

Moreover, in *Stoneking* there was also another teacher in the same school who engaged in physical sexual abuse of female students. One victim of this other teacher testified that she promptly reported the incident to Miller and Smith, who told her "it would be her word against the teacher's and that *she should not tell her parents*." *Id.* at 727 (emphasis added). At least five complaints, by different female student victims, were made to Miller and Smith concerning "sexual assaults" by teachers and staff members at the school. Corrective action was not taken. *Id.* at 728-29. In one of the incidents, Smith suggested to the victim that she might be "framing" the teacher. *Id.* at 728.

Notwithstanding this showing and nothing remotely comparable is shown here—the Sto*neking II* panel was divided in its denial of qualified immunity to the principal and assistant principal, though unanimous in favor of the superintendent.

on the basis that the defendants had "an affirmative duty to provide for their safety," but the Court rejected that theory, even though the offending actor was a public school teacher, and held that the complaint was insufficient because it did "not allege that any of the named school defendants participated in any acts of child molestation. In addition, the plaintiffs do not allege that the school defendants promoted school policies that 'encourage[ed] a climate to flourish where innocent [children] were victimized.' " *Id.* at 271-272, citing *Stoneking II.*

Likewise, the Sixth Circuit has recognized that mere inaction by a supervisor, *even when actually aware of a governmental subordinate's constitutional violations,* does not afford a sufficient basis for liability under section 1983. Thus, in *Poe v. Haydon,* 853 F.2d 418, 429 (6th Cir.1988), *cert. denied,* 488 U.S. 1007, 109 S.Ct. 788, 102 L.Ed.2d 780 (1989), the Court stated:

> "On the issue of § 1983 liability of supervisory personnel, *Hays v. Jefferson County,* 668 F.2d 869 (6th Cir.), *cert. denied,* 459 U.S. 833, 103 S.Ct. 75, 74 L.Ed.2d 73 (1982), established that a supervisory official's failure to supervise, control, or train the offending individual is not actionable, unless the supervisor 'either encouraged the specific incident of misconduct or in some other way directly participated in it.' *Id.* at 874. *See also Bellamy v. Bradley,* 729 F.2d 416, 421 (6th Cir.), *cert. denied,* 469 U.S. 845,105 S.Ct. 156, 83 L.Ed.2d 93 (1984).
>
> Poe's sexual harassment claim fails on this latter score. Even assuming the allegations in her complaint are true, she has not averred that

> 'any of the supervisory officials who [are] defendants in this case *actively* participated in or *authorized* any harassment' by Henderson. *Bellamy*, 729 F.2d at 421. At best, she has merely claimed that the *appellants were aware* of alleged harassment, *but did not take appropriate action.* This *is insufficient* to impose liability on supervisory personnel under § 1983. *Ibid.*" (Emphasis added).

Similar expressions can be found in the decisions of this Court. See, for example, the following from *Reimer v. Smith*, 663 F.2d 1316, 1323-24 (5th Cir.1981):

> "In *Wanger v. Bonner*, 621 F.2d 675 (5th Cir.1980), we stated that a supervisory official could not be held liable for failing to adopt policies to prevent constitutional violations, but could be held liable if he affirmatively adopted policies which were wrongful or illegal and which caused the alleged deprivation of constitutional rights.[5] . . .

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5. In *Watson, supra* [*Watson v. Interstate Fire and Casualty Co.*, 611 F.2d 120 (5th Cir. 1980)], a plaintiff filed a § 1983 suit for her arrest, incarceration, and subsequent commitment to a mental hospital. She sued the deputies who arrested her, and also sued the sheriff of the Parish for failure to supervise his deputies. The court held that this was an insufficient basis for liability under § 1983, absent the sheriff's involvement in a pattern of activity designed to deny the plaintiff her constitutional rights, citing *Rizzo v. Goode*, 423 U.S. 362, 375-76, 96 S.Ct. 598, 606, 46 L.Ed.2d 561 (1976)."

As *Reimer's* footnote 5 observes, *Watson*, 611 F.2d at 123, specifically relied on *Rizzo*. Likewise, the similar statement in *Wanger* that "failure to adopt policies to prevent constitutional violations . . . would not be an adequate basis for [a supervisor's] liability under § 1983," *id.*, 621 F.2d at 680, was also expressly based on *Rizzo*. Similarly we stated in *Ford v. Byrd*, 544 F.2d 194, 195 (5th Cir. 1976), that a police chief is liable for the acts of his subordinates *only* if he directs, orders, participates in, or approves the acts." (Emphasis added). And, in *Vela v. White*, 703 F.2d 147, 153 (5th Cir. 1983), the opinion of the district court, which we said "we hereby adopt," states:

> ". . . a supervisory official cannot be liable merely for failing to adopt policies to prevent constitutional violations; however, he can be held liable if he affirmatively adopts policies which are wrongful or illegal. *Reimer v. Smith*, 663 F.2d 1316,1323 (5th Cir.1981); *Wanger v. Bonner*, 621 F.2d 675 (5th Cir.1980). *See also Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 48 L.Ed.2d 561 (1976), holding that in the absence of a pervasive pattern of intimidation by the *named* defendants, supervisory failure to act in the face of a statistical pattern of violations by other officers fails to state a claim cognizable under § 1983."

As recently as 1992 we stated: "Supervisory officials may be held liable *only* if: (i) they affirmatively participate in acts that cause constitutional deprivation; or (ii) implement unconstitutional policies that causally result in plaintiff's injury." *Mouille v. Live Oak, Tex.*, 977 F.2d 924, 929 (5th Cir.1992), *cert. denied*, __ U.S. __, 113 S.Ct. 2443, 124 L.Ed.2d 660 (1993) (emphasis added).

Our decisions in this area—like those of the other circuits—are, unfortunately, not all of one piece.[15] We have said that "personal participation" is not the only basis for imposing section 1983 liability on a supervisor, and that "a supervisory defendant is subject to § 1983 liability when he breaches a duty imposed by state or local law, and this breach causes plaintiff's constitutional injury." *Sims v. Adams*, 537 F.2d 829, 831 (5th Cir. 1976).[16] *Sims* was decided before *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and after *Monell* we rejected our earlier cases that had "held that where state law would impose vicarious liability, a like cause of action arose under § 1983." *Baskin v. Parker*, 602 F.2d 1205, 1207 (5th Cir.1979). Judge Rubin dissented in *Baskin*, contending that *Monell* did not preclude resort to state law for this purpose. *Baskin* at 1211-1215. Nevertheless, we thereafter from time to time continued to rely on *Sims* for the proposition that even without personal participation a supervisory official may be held personally liable under section 1983 if he "breached a duty imposed upon him by state and local law and . . . this breach caused the plaintiff constitutional injury. *Sims v. Adams*, 537 F.2d 829, 831 (5th Cir. 1976)." *Barksdale v. King*, 699 F.2d 744, 746 (5th Cir. 1983). *See also Lozano v. Smith*, 718 F.2d 756, 768 (5th Cir. 1983) (same); *Bowen v. Watkins*, 669

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15. This is perhaps not surprising considering the somewhat tortuous development of section 1983 jurisprudence beginning with *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

16. In the latter connection, *Sims* cites only *Roberts v. Williams*, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866, 92 S.Ct. 83, 30 L.Ed.2d 110 (1971); it separately, but perhaps relatedly, cites *Anderson v. Nosser*, 456 F.2d 835 (5th Cir.), *cert. denied*, 409 U.S. 848, 93 S.Ct. 53, 34 L.Ed.2d 89 (1972), and *Burton v. Waller*, 502 F.2d 1261, 1274-75 n. 6A (5th Cir.1974), *cert. denied*, 420 U.S. 964, 95 S.Ct. 1356, 43 L.Ed.2d 442 (1975). None of these authorities supports the statement as to state law duties quoted in the text.

F.2d 979, 988 (5th Cir. 1982) ("plaintiffs must show a failure to supervise properly that caused the harm. *See Sims v. Adams*, (5 Cir. 1976), 537 F.2d 829."). So far as these decisions impose personal liability for nonfeasance and proceed on the basis of their being a duty to act affirmatively, many are consistent with *DeShaney* in that they involve a "special relationship," such as that of prison or jail officials to their prisoners. *Barksdale* and *Lozano*, for example, fall in this category.[17] But reliance on state law duties seems inappropriate, as we observed in *Baskin* and as indicated by subsequent Supreme Court decisions. *See DeShaney*, 489 U.S. at 189, 109 S.Ct. at 998 ("A State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes. But not 'all common-law duties owed by government actors were ... constitutionalized by the Fourteenth Amendment.' "); *Daniels v. Williams*, 474 U.S. 327, 334, 106 S.Ct. 662, 667, 88 L.Ed.2d 662 (1986) ("Jailers may owe a special duty of care to those in their custody under state tort law ... but ... we reject the contention that the Due Process Clause of the Fourteenth Amendment embraces such a tort law concept."); *Davis v. Scherer* (rejecting breach of state law duties as a basis to deny qualified immunity under section 1983). *See also Thompkins v. Belt*, 828 F.2d 298, 304 n. 8 (5th Cir. 1987) ("... recent Supreme Court decisions call into question the proposition that a breach of duties imposed by state law can form the basis of an action under section 1983").

The majority's reliance on *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), is misplaced. To begin with, that case was not decided until some two years after the events here in issue, and the Supreme Court described the

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17. What the majority characterizes as holding in *Hinshaw v. Doffer*, 785 F.2d 1260 (5th Cir. 1986), is dicta. What we actually *held* there was that the defendant chief of police was entitled to a directed verdict of no liability. *Id.* at 1265-66.

"inquiry" before it there, which was "the principal focus" of its decision, as "a difficult one; one that has left this Court deeply divided in a series of cases that have followed *Monell*. . . ." *Id.* at 385, 109 S.Ct. at 1203 (footnote omitted). Surely *Canton* did not represent clearly established law in 1986 or 1987, and hence should not be relied on to deny Lankford qualified immunity.[18]

Aside from the question of timing, *Canton's* applicability to the personal liability of individual public school supervisors is doubtful. *Canton* held that in appropropriate circumstances a *municipality* could be liable for constitutional violations resulting from its deliberately chosen training policy for city employees. It is one thing to hold the municipality as a whole liable in such an instance, as the entire corporate entity doubtless has the complete responsibility for and power and control over the training, assignment, and utilization of its employees, and the corporate entity as a whole is the recipient and beneficiary of their services. The case of individual supervisors is distinctly different. Here, for example, Lankford was not the only one in control of or responsible for Stroud; the athletic director and superintendent (and doubtless others) were also involved. Lankford did not hire Stroud and could not fire him, and Stroud did not work for

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18. The majority is similarly in error in denying Lankford qualified immunity on the basis of *Jefferson v. Ysleta ISD*, 817 F.2d 303 (5th Cir. 1987), and *Lopez v. Houston ISD*, 817 F.2d 351 (5th Cir. 1987). The majority holds Lankford may be found liable for failing, between Valentine's Day and late March or early April 1987, to take action so that the Stroud-Doe "relationship might have been derailed at that point." Not only are the cited cases quite inapposite—*Jefferson* involves tying an eight-year-old student to her desk all day as school discipline and has no discussion of supervisory (or municipal) liability, and *Lopez* held the supervisors were not liable for the bus driver's wrongful conduct (which in effect imprisoned the student in the bus while the driver knew he was being beaten)—but neither was handed down until late May 1987.

Lankford. Further, when one looks at municipal liability cases of the *Canton* sort, although the primary focus may be on a policy that consciously elects *not* to do something—in *Canton not* to train beyond a certain level—there is also (at least in the absence of a "special relationship") a concomitant and causal *affirmative* election and action—in *Canton*, to have the decision whether arrestees detained in jail required medical care committed to the sole discretion of the inadequately trained shift commander;[19] in other cases, to arm police officers and put them on the streets with directions to use their weapons as appropriate.[20] Nothing of the kind on the part of Lankford is involved here; he is held liable merely on the basis of inaction. *Canton* does not support personal liability of an individual supervisor for mere failure to act absent a "special relationship" imposing such a duty.

The majority, in holding *Canton* to be apposite in this appeal, relies on *Sample v. Diecks*, 885 F.2d 1099 (3d Cir. 1989); *Greason v. Kemp*, 891 F.2d 829 (11th Cir. 1990); *Stoneking II;* and *Jane Doe "A" v. Special School Dist.*, 901 F.2d 642 (8th Cir. 1990). These

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19. *Canton* assumed, *arguendo*, that the plaintiff's constitutional right to receive medical care while in detention was violated. The *Canton* plaintiff, as an arrestee detained in jail, was apparently in the sort of "special relationship" with the City that placed on it the *affirmative* obligation of protection, a relationship that does not exist here.

20. *Cf. Languirand v. Hayden*, 717 F.2d 220 (5th Cir. 1983), a section 1983 suit against the city for injuries suffered when one of its policemen, inadequately trained in weapons use, shot at the plaintiff's car, where we held that city section 1983 liability for failure to train was not made out, and that "if" such a case would lie it would require "at least" evidence of "a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force." *Id.* at 227-28.

decisions, however, do not support the majority's imposition of an affirmative duty on Lankford, much less its denial of qualified immunity to him. To begin with, both *Sample* and *Greason* are prison inmate cases, thus involving that sort of "special relationship" where the Constitution *does* impose an affirmative duty, as recognized in *DeShaney*, a relationship which the majority disclaims here. Moreover, it is obvious that the majority misreads *Sample*. There the Third Circuit *reversed* a judgment against the supervisor following a bench trial, holding that the trial court's findings did not meet the requirements of *Canton* for establishing municipal liability.[21] Read in context, *Sample's* "no less stringent" language quoted by the majority is plainly saying that the section 1983 plaintiff has *as least as high* a hill to climb to establish a supervisor's liability on a *Canton* type theory as to thereby establish a municipality's liability. To read the statement, as the majority apparently does, to say that the plaintiff's hill for recovery against a supervisor is *no higher than* for recovery against a municipality renders the statement meaningless in the context in which it was made, namely as an explanation of why the judgment against the supervisor could not stand. *Jane Doe A* and *Stoneking II* are similarly inapposite.[22]

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21. The Third Circuit did not address the supervisor's qualified immunity.

22. In *Jane Doe A* the Eighth Circuit affirmed a summary judgment for all defendants, the School District as well as the individual suspervisors. Only in connection with the School District's liability did the Eighth Circuit cite or refer to *Canton*. *Id.* 901 F.2d at 646. *Canton* was not cited at all respecting the individual defendants. Nor did the court address qualified immunity.

In *Stoneking II*, the Court does cite *Canton* in its general discussion of liability, *id.* 882 F.2d at 725, but does not state that it applies to supervisors, and does not refer to it in its discussion of qualified immunity, *id.* at 726-731, where it notes that "the mere failure of supervisory officials to act or investigate cannot be the basis of liability" but

(Cont'd)

Appendix A

The three-part test devised by the majority to sustain the denial of qualified immunity to Lankford requires absolutely no finding of any affirmative conduct on his part, nor even any actual knowledge of the physical sexual abuse,[23] and nevertheless allows a finding that simple inaction by the supervisor "causes" the constitutional injury within the meaning of section 1983, even though this is not a "special relationship" case where the Constitution imposes an affirmative duty. In no reasonable sense of the word "causes" can Lankford's pure inaction—not amounting to tacit or implied condonation or authorization—be said to have "caused" Stroud's physical sexual abuse of Doe. As the Supreme Court observed in *Rizzo*, "[s]uch reasoning, however, blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose

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(Cont'd)
"such officials may not with impunity maintain a custom, practice or usage that communicated condonation or authorization of assaultive behavior." *Id.* at 730.

23. The majority only requires knowledge of facts "plainly pointing toward the conclusion that" such was occurring. In fact, no one—other than Stroud or Doe—witnessed or otherwise knew of physical sexual abuse of Doe by Stroud or even told Lankford that such was likely occurring. Doe even fooled her parents.

The effect of this standard will almost inevitably be to in practice reduce the purported "deliberate indifference" test to one of negligence. If the supervisor—like Lankford here – does not know of the subordinate's physical abuse of the victim, the supervisor may nonetheless be liable if the facts that he did know are ones the Court characterizes as "pointing plainly toward the conclusion that" the sexual abuse was occurring. The supervisor, however,—due to inattention or stupidity—may not have drawn that conclusion, but is nevertheless held liable. Such liability is, in essence, liability based on negligence. In the real world of litigation, that is how these cases will be fought out.

section 1983." *Id.* 423 U.S. at 374, 96 S.Ct. at 606.[24] For the reasons previously stated, *Canton*--a municipal liability case where the *municipality's affirmative conduct* (arresting and detaining the plaintiff and causing the decision as to her need for medical treatment to be made by unqualified municipal employees) *was plainly a cause* of the injury in the accepted sense of the word—is not to the contrary.[25] Even if it were, its standards should not be retroactively applied to deny qualified immunity here.

I therefore respectfully dissent.

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24. The majority's attempt (maj. op. fn. 6) to distinguish *Rizzo* on the basis of *Monell* is misplaced. *Monell*—like *Canton*—was concerned *only* with *municipal* liabili·y. *Rizzo*—like this appeal—was *not* concerned with municipal liability, but only with whether individual supervisors had violated section 1983 by their inaction in the face of violations by their subordinates. The majority has no power to overrule *Rizzo*, that right being reserved to the Supreme Court.

25. The majority, fortunately, does not adopt the special concurrence's view that if the state legislature had imposed on principals a requirement to investigate or report evidence suggesting that a teacher is involved sexually with a student, then Lankford's mere "passivity" would suffice to impose section 1983 liability on him for Stroud's conduct *even if* Lankford were not deliberately indifferent. The special concurrence does not mention any other fault requirement, such as negligence or gross negligence. Apparently, some form of strict liability is contemplated. It is difficult to see how this is consistent with *Canton's* statement that "a lesser standard of fault" than deliberate indifference should be rejected because it "would result in *de facto respondeat superior* liability on municipalities," would "engage the federal courts in an endless exercise of second-guessing," and "would implicate serious questions of federalism." *Id.*, 489 U.S. at 390, 109 S.Ct. at 1206.

Appendix A

EDITH H. JONES, Circuit Judge, with whom GARWOOD, JERRY E. SMITH, BARKSDALE, EMILIO M. GARZA and DeMOSS, Circuit Judges, join, dissenting:

Justice Holmes wrote, "I have said to my brethren many times that I hate justice, which means that I know that if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms." *The Mind and Faith of Justice Holmes*, 435 (M. Lerner Ed. 1943), *cited in* Raoul Berger, *Government by Judiciary*, 289 n. 24 (1977).

The same axiom might be applied to modern-day substantive due process, particularly to my colleagues' airy assumption that Doe had a clearly established constitutional "substantive due process" right or liberty interest protecting her against "sexual fondling and statutory rape" by a school teacher. The majority must reach this conclusion so that they can hold that the school principal lacks qualified immunity for having poorly supervised the lecherous coach who plotted and consummated Doe's seduction. If the principal is cast in judgment by a jury verdict, Doe can then recover § 1983 damages and attorneys' fees.

I laud and join in the majority's morally outraged condemnation of what happened to this young girl.[1] But I question whether the fact that our collective conscience is shocked is a good enough reason for writing an opinion that broadens constitutional remedies in three novel ways. To afford Doe a compensable constitutional claim, the majority must first define a hitherto

1. Nothing could be further from the truth than Judge Higginbotham's assertion that the dissenters in this case see only "casual sex." Coach Stroud committed a crime for which he has served jail time. But not every state employee who commits a crime while on or around his job *necessarily* violates the victim's constitutional rights.

unrecognized and still – vague constitutional right against sexual molestation of underage minors.[2] Second, the majority impute

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2. The Supreme Court has not specifically recognized the substantive due process right or liberty interest of a fifteen year old student in her bodily integrity against "a teacher who uses his authority to sordid sexual ends." The lower court cases the majority cite for this kind of proposition all trace back to two sources: *Ingraham v. Wright*, 430 U.S. 651, 660 n. 12, 97 S.Ct. 1401, 1406 n. 12, 51 L.Ed.2d 711 (1977), and *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

Judge Higginbotham's concurrence suggests that Doe's "fundamental right" stems *a fortiori* from the Supreme Court's decision in *Ingraham v. Wright*, which held that Fourteenth Amendment liberty interests are implicated by the decision of school authorities to inflict corporal punishment on a student. 430 U.S. at 675, 97 S.Ct. 1414. The Court also held that as the demands of procedural due process were adequately met by the common law, no constitutional due process violation occurred. 430 S.Ct. 684, 97 S.Ct. 1419. *Ingraham refused* to determine whether a student has a substantive due process right against corporal punishment. With all due respect, it is a long step from deciding the procedural attributes of corporal punishment to enunciating a right to "freedom of bodily integrity against a teacher who pursues sordid ends." No other court has cited *Ingraham* for this proposition. Taken literally, Judge Higginbotham's view would seem to constitutionalize any intentional tort committed by a school teacher upon a student, for *all* conduct may be described *post hoc* as "abuses of power." *Ingraham* did not go so far; it speaks *only* of punishment.

Rochin enunciated a criminal suspect's substantive due process "right to bodily integrity" not to have his stomach pumped. While *Rochin* has frequently been cited by the Supreme Court for Justice Frankfurter's explanation of substantive due process, its precise holding has been significantly undercut by *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). In *Graham*, the Court rejected a general substantive due process right against excessive force used on arrestees in favor of a right grounded squarely in the Fourth Amendment, textually the most specifically applicable constitutional provision. Since *Rochin*, only in abortion-related cases has the Court spoken of a "fundamental right" related to bodily integrity.

Few lower court cases outside the Fifth Circuit have embraced this substantive due process right of students not to be sexually molested by teachers. *See Stoneking v.*

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state action to the coach's conduct, which by no stretch of the imagination was ever undertaken in the scope of a teacher's pedagogical authority.[3] Third, the majority must strain to reconcile their theory of constitutional supervisory liability with facts that show, at most, negligence by the principal.[4] How far each of these tortuously reasoned steps to liability will be expanded by subsequent caselaw, I cannot predict. But to assert that these propositions were "clearly established" in 1987 is an extravagant overstatement.

What is certain is that the majority's opinion and result are unnecessary either to vindicate Doe's rights or to instill in public school administrators an incentive to prevent lecherous escapades by teachers with students. Ordinarily, the heavy guns of

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Bradford Area Sch. Dist., 882 F.2d 720, 722, 727 (3d Cir. 1989). Other circuit court decisions, while rejecting supervisory liability of schools for teachers' molestation of students, have merely assumed *arguendo* the existence of this liberty interest. In none of them were school supervisors held liable. *See, e.g., Jane Doe A. v. Special Sch. Dist. of St. Louis County*, 901 F.2d 642, 646-47 (8th Cir. 1990); *D.T.* by *M.T. v. Independent Sch. Dist. No. 16*, 894 F.2d 1176, 1186-87 (10th Cir. 1990), *cert. denied* 498 U.S. 879, 111 S.Ct. 213, 112 L.Ed.2d 172 (1990); *Spann v. Tyler Independent Sch. Dist.*, 876 F.2d 437, 438 (5th Cir. 1989), *cert. denied* 493 U.S. 1047, 110 S.Ct. 847, 107 L.Ed.2d 841 (1990). These lower court cases simply did not consider the question of a fundamental liberty interest.

The majority's recitation of supporting authority, in short, is deceptive. The "clearly established right" not to endure sexual molestation by a teacher is not clear at all.

3. *See* Judge Garza's and Judge Garwood's dissents.

4. *See* Judge Garwood's dissent, in which I concur.

constitutional law — particularly a subjective doctrine like substantive due process — should be deployed in service of goals that implicate basic policies of government. The Supreme Court has frequently "rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law." *Collins v. City of Harker Heights*, __ U.S. __, __, 112 S.Ct. 1061, 1070, 117 L.Ed.2d 261 (1992) (citing cases). The Court's reluctance derives from its recognition of the gravity and scope of constitutional decision making:

> The Fourteenth Amendment is a part of a Constitution generally designed to allocate governing authority among the Branches of the Federal Government and between that Government and the States, and to secure certain individual rights against both State and Federal Government. When dealing with a claim that such a document creates a right . . . , we bear in mind Chief Justice Marshall's admonition that "we must never forget, that it is *a constitution* we are expounding." *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 407, 4 L.Ed. 579 (1819) (emphasis in original). Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that " 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may

> already be administered by the States,' " *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976), quoted in *Parratt v. Taylor*, 451 U.S. 527, 544, 101 S.Ct. 1908, 1917[, 68 L.Ed.2d 420] (1981).

Daniels v. Williams, 474 U.S. 327, 332, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986).

There is no systemic abuse of institutional power exemplified in this case, because no state agency, school, school superintendent or principal would ever condone what happened to Doe. Similarly, only by *ipse dixit* does the majority support its belief that Stroud's conduct was an abuse of state power. He was committing a crime just as surely as if he had stolen Doe's watch. Ordinarily, a state actor may point to some state policy in support of his actions. A court's job is to say how that proffered policy stacks up against constitutional protections. Here, there is no policy to be tested. The motive for Stroud's conduct was crass self-gratification. The Constitution has little to say about state actors who commit ordinary crimes for their own benefit. *Compare Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). That task is better left to statutory and common law. "It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns." *Daniels*, 474 U.S. at 333, 106 S.Ct. at 666.

Not only is there no broad constitutional purpose to be served by recognizing for Doe's benefit a constitutional right not to have her bodily integrity compromised by a teacher's sexual abuse, but the constitutional remedy that the majority strives to assure her is merely redundant of well-established criminal, tort and statutory sanctions. Coach Stroud went to jail for committing statutory rape.

Doe has state-law tort claims available against Stroud for assault and battery and intentional infliction of emotional distress. Most significant, perhaps, is her personal Title IX claim against the school district, which, in exchange for use of federal funds, rendered itself potentially liable for this type of sex harassment case. *Franklin v. Gwinett County Public Schools*, __ U.S. __, 112 S.Ct. 1028,117 L.Ed.2d 208 (1992). Doe in fact had a Title IX claim pending in state court when this case was orally argued *en banc*.[5]

The majority's opinion accomplishes no more than to provide Doe another type of money damage award for the injury she has suffered. Where no larger issue than this is at stake — no issue touching upon fundamental questions of school governance or the authority of the state over its teachers or students—the invocation of a new constitutional right is at best superfluous, at worst mischievous. Nowhere in their opinions do the majority or concurrence acknowledge that the precepts of liability they have announced rest on an untested constitutional theory. Their lack of either circumspection or introspection is curious and contradictory of the Supreme Court's approach to the troublesome concept of substantive due process:

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5. In *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the Supreme Court rejected a claim that a defamation action against state officials stated a § 1983 due process claim. The Court pointedly observed "[I]f the same allegations had been made about [plaintiff] by a private individual, he would have nothing more than a claim for defamation under state law. But, he contends, since [defendants] are respectively an official of city and county government, his action is thereby transmuted into one for deprivation by the state of rights secured under the Fourteenth Amendment." 424 U.S. at 698, 96 S.Ct. at 1159. The Court, unlike the majority here, would have none of it.

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225-226,106 S.Ct. 507, 513-514, 88 L.Ed.2d 523 (1985). The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins v. City of Harker Heights, __ U.S. at __, 112 S.Ct. at 1068. *See also Albright v. Oliver*, __ U.S. __, 114 S.Ct. 807, __ L.Ed.2d __ (1994), (plurality opinion), reiterating this proposition. Justice Scalia further explained the Court's reticence to lay the imprimatur of a substantive due process right on a claim not textually tied to "liberty" in the fourteenth amendment:

> It is an established part of our constitutional jurisprudence that the term "liberty" in the Due Process Clause extends beyond freedom from physical restraint. *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). Without that core textual meaning as a limitation, defining the scope of the Due Process Clause "has at times been a treacherous field for this Court," giving "reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members

> of this Court." *Moore v. East Cleveland*, 431 U.S. 494, 502, 97 S.Ct. 1932, 1937, 52 L.Ed.2d 531 (1977).

Michael H. v. Gerald D., 491 U.S. 110, 121, 109 S.Ct. 2333, 2341, 105 L.Ed.2d 91 (1989) (opinion for four Justices).

The Supreme Court has been true to its word. Apart from developing the amorphous "right of privacy" that underlies the abortion cases, the Court has authored *no* decision expanding substantive due process rights for many years.[6] Moreover, in

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6. Apart from abortion-related cases, the Court has not upheld a new substantive due process claim since 1977. *Moore v. East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977).

As one prominent treatise states, "The list of rights which the Court has found to be fundamental, and, therefore, worthy of strict judicial scrutiny, is not a long one." Ronald D. Rotunda and John E. Nowak, 2 Treatise of Constitutional Law § 15.7, at 434 (2d Ed. 1992). The "fundamental rights" these scholars list are freedom of association; right to vote; right to interstate travel; right to fair criminal process; procedural due process; right to privacy involving marital decisions; child bearing and child rearing. *Id.* The Court has also elaborated upon the scope of constitutional protection available to those whose physical "liberty" has been restrained by the state. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982); *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990). Such decisions relate to "liberty" in the traditional sense, *i.e.*, as freedom from physical restraint.

In all of the following cases, by contrast, the Court has rejected novel fundamental rights claims: *Albright v. Oliver, supra*, (rejecting substantive due process claim for malicious prosecution); *Reno v. Flores*, __ U.S. __, __, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993) (alien juveniles have no "fundamental" right to be placed with private custodian rather than government institution); *Collins v. Harker Heights*, __ U.S. at __, 112 S.Ct. at 1069 (governmental employer's duty to provide safe working environment for employees is not substantive component of due

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analyzing claims of rights that, while unenumerated in the specific guarantees of the Constitution or Bill of Rights, are proffered as "fundamental," the Court has insisted on a precise definition of the right as a matter of judicial self-discipline. *Reno v. Flores*, __ U.S. __, __, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993); *Collins v. City of Harker Heights*, __ U.S. at __, 112 S.Ct. at 1068. The majority and concurring opinions make no attempt to fulfill this rigorous standard. The core of "liberty" is freedom from bodily restraint. *Foucha v. Louisiana*, __ U.S. __, __, 112 S.Ct. 1780, 1785, 118 L.Ed.2d 437 (1992). Doe's "right" not to be seduced by her teacher does not obviously fall within the fourteenth amendment's assurance that a person's "liberty" will not be taken without due process of law. Rampant throughout the majority and concurring opinions are various descriptions of what happened to Doe that shed little light on the precise scope of the "liberty interest" that will henceforth be enforceable under § 1983 by her and other public school students.

The majority apparently believe that Doe's substantive due process right to "bodily integrity" is self-evidently "so rooted in the traditions and conscience of our people as to be ranked as

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process); *Michael H. v. Gerald D.*, 491 U.S. at 126, 109 S.Ct. at 2343 (no fundamental right of putative natural father to obtain parental prerogatives where child born into extant marital family) (plurality opinion); *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 201, 109 S.Ct. 998, 1006, 103 L.Ed.2d 249 (1989) (state has no substantive due process duty to protect a child from father's violence where state had once taken child into temporary custody); *Baker v. McCollan*, 443 U.S. 137, 144, 99 S.Ct. 2689, 2694, 61 L.Ed.2d 433 (1979) (no deprivation of due process where brother mistakenly detained for three days pursuant to search warrant conforming to Fourth Amendment requirements); *Paul v. Davis*, 424 U.S. at 713-14, 96 S.Ct. at 1166 (claim that state may not publicize record of an arrest is far afield from "right of privacy" cases under substantive due process).

fundamental," *Michael H. v. Gerald D.*, 491 U.S. at 122,109 S.Ct. at 2341, *quoting Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934) (Cardozo, J.). But that argument states a condusion rather than a reason for inventing a new constitutional doctrine.[7] It is *not* obvious why this "right" should be more "fundamental" than Doe's right to her reputation or her right not to be negligently run over by a state employee, neither of which enjoys constitutional protection. *See Paul v. Davis, supra.* Furthermore, Doe's right has been protected in state criminal and tort law and by federal statute.[8] The attention this "right" has received throughout state and federal statutory and common law demonstrates a history of ordered deliberation and strongly suggests that Doe's right is not "fundamental" in the sense that Doe needs the additional armature of constitutional common law to protect her.[9]

Advancing new and expanded theories of "fundamental rights" is always a heady business, gratifying because the judge

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7. Heavy irony inheres in the majority's premising Doe's bodily integrity right on the Supreme Court's abortion cases. The "right of privacy" stated in those cases has been used to *attack* statutory rape statutes, and three justices would have granted certiorari to rule on that issue. *See Michael M. v. Superior Court*, 450 U.S. 464, 491 n. 5, 101 S.Ct. 1200, 1215 n. 5, 67 L.Ed.2d 437 (Brennan, J., with Justices White and Marshall, dissenting); *see also* concurring opinion of Justice Blackmun, *Id.* at 483, 101 S.Ct. 1211. *See, e.g., State v. Jones*, 619 So.2d 418 (Fla.App. 1993) (certifying constitutionality of Florida statutory rape law to State Supreme Court).

8. Although all of the states maintain criminal laws against statutory rape, not all of them set the age of consent at the age of fifteen. *See* Judge Garwood's dissent. In some of the states, the age of consent is lower. This poses an interesting question: has the majority made a constitutional offense of conduct that in some states is not criminal?

9. In his concurrence, Judge Higginbotham suggests that my conclusion here

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believes he has served "justice" in the broadest sense. But history has shown that the "Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution." *Moore v. East Cleveland*, 431 U.S. 494, 544, 97 S.Ct. 1932, 1958, 52 L.Ed.2d 531 (1977) (White, J., dissenting). Concretely, the Supreme Court has cautioned against expanding the scope of "liberty" embodied in substantive due process and has advised that the Due Process clause should not be used to constitutionalize ordinary torts. In their zeal to "do justice," my colleagues of the majority have thrown caution to the winds and, quite unnecessarily, have awarded Doe novel constitutional protection that supplements a variety of legal remedies already available to her. If Doe has a viable constitutional claim, I say, let the Supreme Court say so.[10]

I respectfully dissent.

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that Doe has no constitutional right is based in part on the availability of other state and federal remedies. *See* Higginbotham Concurrence at 5. However, that suggestion seriously mischaracterizes my argument. My point is that the majority's ill-founded finding of a "fundamental" right is especially unnecessary where the constitutional remedy is merely redundant of well-established criminal, tort, and statutory sanctions, not that the presence of the latter dictate the absence of the former.

10. None of this discussion suggests that the Supreme Court would not ultimately recognize a constitutional "fundamental right" of a young student not to be sexually molested by a teacher in the classroom or on school grounds, or of an older student not to be confronted with a teacher's sexual demands as a *quid pro quo* for receiving good grades. But to comport with the Supreme Court's own above-cited pronouncements, the reason such a "right" is "fundamental" should be clearly articulated; the parameters of the "right" should be carefully and cautiously defined; and the "right" should accomplish a public purpose beyond simply constitutionalizing tortious conduct. The majority and concurring opinions have done none of these things.

Appendix A

EMILIO M. GARZA, Circuit Judge, concurring in part and dissenting in part:

I concur in the judgment of the Court to the extent that it holds "[s]ummary judgment should have been granted to defendant Caplinger on the grounds of qualified immunity." However, I respectfully dissent from the Court's judgment that "Jane Doe has, in a manner sufficient to withstand a motion for summary judgment, stated a claim under § 1983 that defendant Lankford was deliberately indifferent to his subordinate's violation of her constitutional right to bodily integrity" — essentially for the reasons so forcefully articulated by Judges Garwood and Jones in their dissenting opinions, in which I join.[1]

I write separately, however, to comment on an issue fundamental to § 1983 that the majority opinion essentially ignores and the concurring opinion only briefly addresses: the lack of state action.[2]

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1. These dissenting opinions address the two prong analytical structure for claims of qualified immunity recently established by the Supreme Court. *See Siegert v. Gilley*, 500 U.S. 226, __, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1992) ("A necessary concomitant to determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.") ("We think the Court of Appeals should not have assumed without deciding this preliminary issue in the case.") Judge Jones has presented her arguments on the first prong of the *Siegert* analysis — "has [the plaintiff] asserted a violation of a constitutional right at all[?]" Judge Garwood has addressed the second prong — "whether the constitutional right asserted by [the] plaintiff is 'clearly established' at the time of the defendant[s] acted[?]"

2. *See infra* note 5.

Appendix A

I

The concurring opinion correctly focuses on "the circle of liability under 42 U.S.C. § 1983." Concurring op. slip op. at 2878. "We have interpreted section 1983 to require a court to determine whether a rights violation occurred, whether it occurred under the color of state law, and whether the particular state actor or actors before the court caused the violation." *Id.* (citing *Bush v. Viterna*, 795 F.2d 1203, 1209 (5th Cir.1986)). Under the second prong of the *Bush* test, the concurrence concludes that, based on Stroud's position as a teacher, "the deprivation of liberty[— whether such deprivation occurred on or off school grounds —]occurred under the color of state law":

> [T]he approval which Stroud conferred on Doe is both one of the most common and one of the most effective tools used by teachers in affecting the behavior of their students. *It is precisely this use by Stroud of his position of authority to which I point. The very official nature of this attention* facilitated his efforts — and indeed enabled him — to violate her rights.

Id. slip op. at 2881-82 (emphasis added).

> Stroud's official interactions with Doe and his sexual involvement with her together constituted an indivisible, ongoing relationship. The special attention Stroud gave Doe *as her teacher* afforded him the opportunity to exert his influence. He levered his authority to press upon Doe his sexual

> desires, while both on and off school grounds. He treated Doe differently than he treated other members of his class. He gave her good grades, required of her less work than other students, and allowed her to behave as she liked in his classroom. *This manipulative course of conduct was an abuse of power conferred by the state.* I am persuaded that Stroud acted under color of state law.

Id. slip op. at 2881 (emphasis added). With less analysis, the majority opinion concludes that Stroud acted under color of state law because a "real nexus exists between the activity out of which the violation occur[red] and the teacher's duties and obligations as a teacher."[3] Maj. op. slip op. at 2869 n. 4. Determining whether such a "nexus" supports a finding of state action for the purposes of § 1983, sufficient to withstand a motion for summary judgment, requires a review of case authority on the following issue what grant of authority under state law to a state official is required to support a finding of state action.

II

A

"Section 1983 provides a remedy against 'any person' who, *under color of state law,* deprives another of rights protected by the Constitution."[4] *Collins v. City of Harker Heights,* __ U.S. __,

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3. *See also infra* note 21.

4. Section 1983 states, in relevant part: "Every person who, *under color of any statute, ordinance, or regulation, custom, or usage, of any state* . . . subjects, or causes

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__,112 S.Ct. 1061, 1066, 117 L.Ed.2d 261 (1992) (emphasis added). Thus, in any cause of action brought under § 1983, a fundamental "question that must be asked is whether the alleged deprivation of a federal right has been accomplished by state action." *Bush v. Viterna*, 795 F.2d 1203, 1209 (5th Cir. 1986) (citation omitted). To answer this question, "it will obviously be necessary to consult state law in order to decide whether the deprivation occurred 'under color of any statute, ordinance, regulation, custom, or usage' of the state." *Id.*

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The Supreme Court has established two lines of cases that must be consulted when determining whether state action exists. The first line of cases, represented by *Barney v. City of New York*, 193 U.S. 430, 437, 24 S.Ct. 502, 503 48 L.Ed. 737 (1904), holds that state action does not exist when the act complained of "was not only not authorized, but was forbidden by [state] legislation."[5]

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to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ." 42 U.S.C. § 1983 (emphasis added). Significantly, neither the word "position" nor "office" is used in the statute. *Cf. Mesa v. California*, 489 U.S. 121, 135, 109 S.Ct. 959, 968, 103 L.Ed.2d 99 (1989) (defining "under color of office" to mean "in the performance of [the official's] duties").

5. Technically, *Barney* and the other Fourteenth Amendment cases referred to *infra* involve the question whether the actions of a state official constituted "state action" for the purpose of the Fourteenth Amendment. However, these cases are relevant to the under-color-of-state-law inquiry because "in a § 1983 action brought against a state official, the statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929, 102 S.Ct. 2744, 2749, 73 L.Ed.2d 482 (1982).

In *Barney*, the plaintiff sought to enjoin the construction of a subway tunnel adjacent to his property, contending that it would deprive him of his property in violation of the Due Process Clause because the tunnel was being built closer to his property than was authorized by the relevant resolutions. The lower court dismissed the bill for want of jurisdiction. The Supreme Court affirmed, finding that no state action occurred because "the construction of the . . . tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the State of New York within the intent and meaning of the 14th Amendment." *Id.* at 437, 24 S.Ct. at 503; *see also id.* at 441, 24 S.Ct. at 505 ("In the present case defendants were proceeding, not only in violation of provisions of state law, but in opposition to plain provisions."). Consequently, the plaintiff did not state a federal cause of action because "it is for the state courts to remedy acts of state officers done without the authority of, or contrary to, state law." *Id* at 438, 24 S.Ct. at 503; *see id.* at 439, 24 S.Ct. at 504 (" 'The wrongful act of an individual, unsupported by any [state] authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, . . . but if not sanctioned in some way by the state, or not done under state authority, his rights remain full in force and may presumably be vindicated by resort to the laws of the state for redress.' ") (quoting *The Civil Rights Cases*, 109 U.S. 3, 16-17, 3 S.Ct. 18, 25-26, 27 L.Ed. 835 (1883)).[6]

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6. See also *Lugar*, 457 U.S. 933, 102 S.Ct. 2744, where a debtor brought a § 1983 claim against his corporate creditor and its president, alleging that they deprived him of his property without due process by obtaining a prejudgment attachment of the property pursuant to a Virginia statute. The Court agreed with the defendants' contention that no state action occurred. "As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that most rights secured by the Constitution are protected only against infringement by governments." *Id.* at 936, 102 S.Ct. at 2753 (citation omitted).

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Appendix A

In *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944), the plaintiff contended that the defendants, members of the Illinois State Primary Canvassing Board, violated his Fourteenth Amendment rights when they failed and subsequently refused to file with the Secretary of State a certificate listing the plaintiff as a candidate for a seat in the state assembly. Justice Frankfurter stated that the Board's dereliction of its duty did not constitute state action because the Board violated state law by not filing a correct certificate:

> I am unable to grasp the principle on which the State can here be said to deny the plaintiff the equal protection of the laws of the State when the foundation of his claim is that the Board had disobeyed the authentic command of the State. . . .

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> "In 1883, this Court in the *Civil Rights Cases*, 109 U.S. 3 [3 S.Ct. 18, 27 L.Ed. 835] affirmed the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield."

Id. (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974)). Accordingly, "the conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State" for a § 1983 cause of action to lie. *Id.* at 937, 102 S.Ct. at 2753. The Court held that the plaintiff had not stated a cause of action under § 1983 for misuse of the state statutory scheme because "the conduct of which [plaintiff] complained could not be ascribed to any governmental decision; rather, [defendants] were acting *contrary to the relevant policy articulated by the State*. Nor did they have the authority of state officials to put the weight of the State behind their private decision. . . ." *Id.* at 940, 102 S.Ct. at 2755 (emphasis added).

> I am clear, therefore, that the action of the Canvassing Board taken, as the plaintiff himself acknowledges, in defiance of the duty of that Board under Illinois law, cannot be deemed the action of the State. . . .[7]

Id. at 17, 64 S.Ct. at 405 (Frankfurter, J., concurring) (citing *Barney*).

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The second line of Supreme Court cases holds that state action is established if the state official "ha[s] jurisdiction to [act] under the laws of the state," *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20, 37, 28 S.Ct. 7, 13, 52 L.Ed. 78 (1907), and "misuses the power possessed to do a wrong forbidden by the [Constitution]." *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 287, 33 S.Ct. 312, 315, 57 L.Ed. 510 (1913).

In *Raymond*, the plaintiff company alleged that the Illinois state board of equalization—a body "provided by the state for the purpose of raising the public revenue by way of taxation" of corporations—violated the Fourteenth Amendment by making

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7. The majority, apparently disagreeing with Justice Frankfurter's analysis, found that the right alleged by the plaintiff to have been violated simply was "one secured to him by state statute and the deprivation of right [was] alleged to result solely from the Board's failure to obey state law." *Id.* 321 U.S. at 7, 64 S.Ct. at 400. Because the plaintiff did not contend "that the statutes of the state [were] in any respect inconsistent with the guarantees of the Fourteenth Amendment," *id.*, the Court held that he had failed to allege a federal cause of action. *Id.* at 11, 64 S.Ct. at 402 ("Mere violation of a state statute does not infringe the federal Constitution.").

certain assessments upon it. The Supreme Court found that the board's ratification of the challenged assessment constituted state action because "the board was making an assessment which it had jurisdiction to make under the laws of the state." 207 U.S. at 37, 28 S.Ct. at 13. Because the state had specifically granted to the board the power to make the assessments that the plaintiff had challenged, the Court determined that *Barney*, which held that "where the act complained of was forbidden by the state legislature, it could not be said to be the act of the State," *id.*, did not control.[8]

Similarly, the plaintiff in *Home Telephone* alleged that the city of Los Angeles, by adopting an ordinance setting rates for telephone services at confiscatory levels, violated the Fourteenth Amendment, as well as the state constitution. The city contended that "the [Fourteenth] Amendment deals only with acts of state officers within the strict scope of the public powers possessed by them, and does not include an abuse of power by an officer as the result of a wrong done in excess of the power delegated." 227 U.S. at 286, 33 S.Ct. at 315. The Supreme Court disagreed, holding that state action occurs "where an officer or other representative of a state, in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the [Fourteenth] Amendment." *Id.* Where the state grants an official the authority to act and the official acts pursuant to that authority but exceeds the limits of the grant, "inquiry into whether the state has *authorized* the wrong is irrelevant." *Id.* (emphasis added). Accordingly, the city's conduct constituted state action because

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8. Justice Holmes — "unable to grasp the principle on which a state is said to deprive the [plaintiff of its property without due process because a subordinate board, subject to the control of the supreme court of the state, is said to have violated the express requirement of the state in its Constitution" — disagreed. *Id.* 207 U.S. at 39, 28 S.Ct. at 14 (Holmes, J., dissenting).

"acts done under the authority of a municipal ordinance passed in virtue of power conferred by a state are embraced by the 14th Amendment." *Id.* at 292, 33 S.Ct. at 317; *see also id.* at 286, 33 S.Ct. at 315 ("the settled construction of the Amendment is that it presupposes the possibility of an abuse by a state officer . . . *of the powers possessed,* and deals with such a contingency") (emphasis added).

3

The Supreme Court first applied the lessons of the Fourteenth Amendment inquiries to the "under color of law" issue in three criminal cases: *United States v. Classic,* 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941); *Screws v. United States,* 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945); and *United States v. Raines,* 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960).

In *Classic,* the government charged that the defendants, Louisiana election officials, altered and falsely counted ballots cast in a primary election, in violation of the federal criminal civil rights counterpart to § 1983. *See* 18 U.S.C. § 242. Relying on *Home Telephone's* definition of state action, the Court held that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[9] *Id.* 313 U.S. at 326, 61 S.Ct. at 1043. Consequently, the officials acted under color of state law when altering and falsely counting the ballots because their acts "were committed in the course of their performance of duties under the Louisiana statute requiring them

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9 This statement is "founded on the rule announced in *Ex Parte Virginia,* 100 U.S. 339, 346-47, 25 L.Ed. 676 (1880), that the actions of a state officer *who exceeds the limit of his authority* constitute state action for purposes of the Fourteenth Amendment." *Lugar,* 457 U.S. at 929, 102 S.Ct. at 2750 (emphasis added).

to count the ballots, to record the result of the count, and to certify the result of the election." *Id* at 325-26, 61 S.Ct. at 1042-43.

The government in *Screws* charged that the defendants — a Georgia sheriff, policeman, and special deputy — arrested and then beat to death Robert Hall, a young African-American, in violation of the federal criminal civil rights counterpart to § 1983. Citing *Classic* for the principle that misuse of authority possessed by virtue of state law constitutes action taken under color of state law, the Court held that the defendants acted under color of state law in assaulting Hall because "they were officers of the law who made the arrest [and, b]y their own admissions they assaulted Hall in order to protect themselves and to keep their prisoner from escaping. It was their duty under Georgia law to make the arrest effective." *Id.* at 107-08, 65 S.Ct. at 1038.

Raines involved government allegations that a Georgia county Board of Registrars had racially discriminated against African-Americans who sought to register to vote, in violation of 42 U.S.C. § 1971. The court held that "the conduct charged—discrimination by state officials, within the course of their official duties, against the voting rights of United States citizens, on grounds of race or color—[was] certainly . . . 'state action.' " *Id.* at 25, 80 S.Ct. at 525. The Court also rejected the defendants' argument that their conduct did not constitute state action because the "higher echelons of authority in the State" had not yet approved it: "every state official, high and low, is bound by the Fourteenth and Fifteenth Amendments."[10] *Id* . Clearly, by 1960 a state official

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10. The Court in *Raines* also stated that where the state official's conduct constitutes state action, "it makes no difference that the discrimination in question . . . is also violative of state law." 362 U.S. at 25, 80 S.Ct. at 525 (citing *Snowden*, 321 U.S. at 11, 64 S.Ct. at 403). The import of this statement is unclear, as the Court appeared to be responding to the defendants' argument that state action does not exist until a lower

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could not argue that he did not act under color of state law because his conduct violated state law if, at the time of acting, he possessed a general grant of authority from the state and misused it.[11]

The Supreme Court first addressed § 1983's "under color of law" requirement in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 6 L.Ed.2d 492 (1961), *overruled in part on other grounds, Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The Monroes sued the city of Chicago, among others, under § 1983, alleging that thirteen Chicago police officers broke into their home without a warrant, routed them from bed, made them stand naked while the officers ransacked their home, and then took James Monroe to the police station where he was interrogated for ten hours. The city argued that because the officers' conduct violated both the Illinois

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official's conduct has been approved by a higher official — i.e., if the higher official reverses the lower official's decision, the lower official's decision then contravenes state law and does not constitute state action. Whatever the merits of this type of after-the-fact declaration, it is not relevant here because state criminal law unquestionably prohibited Stroud's conduct.

11. When a state gives an official a "general grant of authority," the state empowers the official to act in the name of the state in certain diverse factual settings. Inherent in such a grant, then, is the discretion given to the official to determine exactly when and how to act. For example, by authorizing police officers to effect searches and seizures, the state gives the officers discretion to decide when and where to search. The state then attempts to control the officers' exercise of discretion by outlawing unreasonable searches and seizures. However, because the grant of authority necessarily entails that the officers exercise discretion, and because it is inevitable that police officers on occasion will mistakenly exercise their discretion to make an unreasonable search or seizure, the grant of authority implicitly recognizes that the officers can use it to violate state law. Thus, the officers, in effecting an unreasonable search, act under color of state law despite the fact that the state has outlawed the officers' actions.

constitution and state laws prohibiting unreasonable searches and seizures, § 1983's requirement that the challenged acts be taken under color of state law had not been met. 365 U.S. at 172, 81 S.Ct. at 476. The Court rejected this argument, holding that the phrase "under color of state law" includes deprivations of constitutional rights effected by state officials acting in violation of state law.[12] *Id.* at 183, 81 S.Ct. at 482. The Court then held that the police officers acted under color of state law by abusing the authority granted to them by the state to effect searches and seizures.[13]

B

Although it has been stated that *Barney* has been " 'so restricted by . . . later decisions' " that it "must be regarded as having 'been worn away by the erosion of time' . . . and of contrary

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12. In so holding, the *Monroe* court relied upon *Classic's* construction of "under color of law" in the criminal context. *Classic*, in turn, relied upon *Home Telephone's* construction of "state action" in the Fourteenth Amendment context. Justice Frankfurter, although he joined in the opinion in *Classic*, dissented in *Monroe*, arguing that "police intrusion in violation of state law is not a wrong remediable under [§ 1983]." 365 U.S. at 242, 81 S.Ct. at 513.

13. The Supreme Court initially defined the question presented in *Monroe* as "whether Congress, in enacting [§ 1983], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities *by an official's abuse of his position.*" 365 U.S. at 172 81 S.Ct. at 476 (emphasis added). However the Court apparently considered this phrasing of the issue merely to be a restatement of *Classic's* holding that "action taken under color of law" includes " '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *Id.* 365 U.S. at 184, 81 S.Ct. at 482 (quoting *Classic*, 313 U.S. at 326, 61 S.Ct. at 1043); *see id.* at 186, 81 S.Ct. at 484 ("conclud[ing] that the meaning given 'under color of' law in the Classic case and in the Screws . . . case[ ] was the correct one"); *see also Lugar*, 457 U.S. at 940, 102 S.Ct. at 2755 (stating that *Monroe* adopted "the abuse of authority doctrine" in 1983 cases).

authority,"[14] *Raines*, 362 U.S. at 26, 80 S.Ct. at 525 (citations omitted), *Barney*, like Doe's claim, can be distinguished from the later cases on one ground particularly relevant to today's decision: *Barney* involved a state official acting in the complete absence of authority,[15] while all the later cases involved state officials acting pursuant to, but exceeding, a general grant of authority from the state. *See Raymond*, 207 U.S. at 37, 28 S.Ct. at 13 ("the board was making an assessment which it had jurisdiction to make under the laws of the state"); *Home Telephone*, 227 U.S. at 294, 33 S.Ct. at 317 (the challenged "acts [were] done under the authority of a municipal ordinance passed in virtue of power conferred by a state"); *Classic*, 313 U.S. at 325-26, 61 S.Ct. at 1042-43 (challenged acts "were committed in the course of [the officials'] performance of duties under the Louisiana statute"); *Screws*, 325 U.S. at 107-08, 65 S.Ct. at 1038 (officials were fulfilling "their duty under Georgia law"); *Raines*, 362 U.S. at 25, 80 S.Ct. at 525 ("discrimination by state officials, within the course of their official duties"); *Monroe*, 365 U.S. at 183, 81 S.Ct. at 482 (police officers abusing the authority granted to them by the state to effect reasonable searches and seizures).

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14. Justice Frankfurter, on the other hand, found "[n]either the wisdom of [*Barney's*] reasoning nor its holding . . . impaired by subsequent decisions." *Snowden*, 321 U.S. at 17, 64 S.Ct. at 405 (Frankfurter, J., concurring); *see also Screws*, 325 U.S. at 147-48, 65 S.Ct. at 1057 (dissenting opinion) ("It has never been satisfactorily explained how a State can be said to deprive a person of liberty or property without due process of law when the foundation of the claim is that a minor official has disobeyed the authentic command of his State. . . . [*Barney*], which ruled otherwise, although questioned, has never been overruled.").

15. *See Barney*, 193 U.S. at 437, 24 S.Ct. at 503 (noting that the defendants' act "was not only not authorized, but was forbidden by [state legislation]"); *Lugar*, 457 U.S. at 940, 102 S.Ct. at 2753 (finding that no state action occurred because the defendants "were acting contrary to the relevant policy articulated by the State . . . [and did not] have the authority of state officials to put the weight of the State behind their private decision").

Accordingly, *Barney* appears to be at odds with *Home Telephone* and its progeny only if one fails to examine the relevant grant of authority to the state actor under state law in each case. For example, as *Monroe* held, acts taken pursuant to—but exceeding—a general grant of authority will give rise to a § 1983 claim when such acts deprive a person of a constitutionally protected right. Thus, the police officers in *Monroe*, while unquestionably violating state law, acted under color of state law because they acted pursuant to a general grant of authority. In other words, the police officers exercised the legitimate authority granted by the state to conduct searches of homes and arrest persons suspected of criminal activity. However, the officers exceeded the limits of that authority by effecting an unreasonable search and seizure. Consequently, the Monroes could sue under § 1983 because the officers misused or abused the otherwise legitimate authority granted to them by state *law.*[16] *Cf. Screws*, 325 U.S. at 110, 65 S.Ct. at 1039 (noting that in both *Classic* and *Screws*, the "officers of the State were performing their official duties; in each the power which they were authorized to exercise was misused.").[17]

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16. In each of this Circuit's cases, cited in either the majority or concurring opinion, the state actor — whether it be a police officer or a school teacher — was generally authorized by the State to use force in certain situations. In none of these cases, however, did the state actor violate state law simply by using force or administering corporal punishment. Instead, it was only when the state actor exceeded his or her authority under state law that a constitutional violation occurred. *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981) (riot control during Mardi Gras); *Jefferson v. Ysleta Independent School Dist.*, 817 F.2d 303 (5th Cir. 1987) (classroom discipline); *Fee v. Herndon*, 900 F.2d 804 (5th Cir.) (same), *cert. denied*, 498 U.S. 908, 111 S.Ct. 279, 112 L.Ed.2d 233 (1990). Accordingly, the challenged actions were taken under color of state law because they were taken pursuant to a general grant of authority.

17. Similarly, *Home Telephone* did not squarely address the issue whether actions that were both taken in violation of state law and inconsistent with the actor's

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However, not all unlawful actions taken by state officials are taken under color of law. *See Screws v. United States*, 325 U.S. 91,111, 65 S.Ct. 1031,1040, 89 L.Ed. 1495 (1945) ("It is clear that under 'color' of law means under 'pretense' of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it."); *see also Baker v. McCollan*, 443 U.S. 137,146, 99 S.Ct. 2689, 2696, 61 L.Ed.2d 433 (1979) (noting that even intentional torts do not become constitutional violations merely because the tortfeasors are state officials). In *Barney*, the board did not have the power to allow the construction of the railroad tunnel in a place different from that authorized by the relevant resolutions because the board had no general authority to depart from the resolutions.[18] Consequently, by approving a different construction site, the state officials did not exceed the limits of their authority, as in *Monroe*,

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grant of authority constitute state action. In that case, state law gave the city authority to enact ordinances setting telephone rates. Thus, when the city set the unlawful rates, it misused the authority granted to it but did not act without authority. Accordingly, the city's acts constituted state action even though they also violated state law. 227 U.S. at 292, 33 S.Ct. at 317.

18. The board was "empowered to prescribe the routes and general plan of any proposed rapid transit railroad within the city." *Barney*, 193 U.S. at 437, 24 S.Ct. at 503. However, the "[c]onsents of the municipal authorities and the abutting property owners to construction on the routes and plans adopted must be obtained, and any change in the detailed plans and specifications must accord with the general plan of construction, and, if not, like consents must be obtained to such change." *Id.* Because the board had previously prescribed the routes and general plan of the tunnel by two resolutions, "which received the assent of the local authorities and of the appellate division of the supreme court in lieu of the consent of the abutting property owners," *id.* at 431, 193 S.Ct. at 502, the board was required to obtain the consent of the local authorities and abutting property owners before making any changes to the plan of construction.

but rather acted in the complete absence of authority. As a result, the board's departure from the approved plans constituted a breach of state law and could not constitute action taken under color of state law. Thus, the Court found that the Due Process Clause of the Fourteenth Amendment was not violated by the board's illegal acts.[19]

III

"Jane Doe brought this § 1983 civil rights lawsuit against Stroud, the school district, Superintendent Caplinger, and Principal Lankford[,] ... charg[ing] *inter alia* that these defendants, while acting under color of state law, deprived her of her constitutional rights guaranteed by the Fourteenth Amendment's Due Process and Equal Protection Clauses, in violation of 42 U.S.C. § 1983." Maj. op. slip op. at 2866-67. After initially finding that "the Constitution protects a schoolchild from physical sexual abuse — here, sexually fondling a 15-year old school girl and statutory rape — by a public school teacher," *id.* slip op. at 2868, the majority interprets Doe's claim against

19. This reading of *Barney* is supported by the Supreme Court's pronouncements on the liability of municipalities under § 1983 for acts taken by government officials. "[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Monell*, 436 U.S. at 694, 98 S.Ct. at 2037. Instead, it is only when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government entity is responsible under § 1983." *Id.*, 436 U.S. at 694, 98 S.Ct. at 2037-38; *see also Pembaur v. City of Cincinnatti*, 475 U.S. 469, 486, 106 S.Ct. 1292 1301, 89 L.Ed.2d 452 (1986) (White, J., concurring) ("Local law enforcement officers are expected to obey the law. ... Where the controlling law places limits on their authority, they cannot be said to have the authority to make contrary policy."). Accordingly, if a state official without policy-making authority acts contrary to established policy, his conduct is not imputed to the state.

defendants Caplinger and Lankford as alleging "failures of supervisors to prevent substantive due process violations occasioned by [Stroud]" that demonstrate a "deliberate indifference to . . . her constitutional rights." *Id.* slip op. at 2872-73. Accordingly, for the supervisors to be liable, Stroud must have been acting under color of state law when committing the acts that Doe alleges violated her right to due process.[20] The majority, however, gives short shrift to this initial question:[21] whether an actor, engaged in the physical sexual abuse of a student, is acting *under color of state law.*

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20. If Stroud was not acting under color of state law when he engaged in intercourse with or fondled Doe, the supervisory defendants cannot be held liable under § 1983 because "nothing in the Due Process Clause requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989) *see also Maldonado v. Josey*, 975 F.2d 727, 731 (10th Cir.1992) (compulsory school attendance laws do not give rise to an affirmative constitutional duty to protect students from deprivations of constitutional rights by private actors), *cert. denied*, __ U.S. __, 113 S.Ct. 1266, 122 L.Ed.2d 662 (1993), *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1372-73 (3d Cir. 1992) (school authorities do not have an affirmative constitutional duty to protect students from sexual abuse by other students), *cert. denied*, __ U.S. __, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993); *J.O. v. Alton Community Sch. Dist. 11*, 909 F.2d 267, 272-73 (7th Cir. 1990) (school officials do not have an affirmative constitutional duty arising out of their "special relationship" with students to protect students from sexual assault by a teacher).

21. *See* maj. op. slip op. at 2869 n. 4 ("As the court in *D.T.* recognized, if a 'real nexus' exists between the activity out of which the violation occurs and the teacher's duty and obligations as a teacher, then the teacher's conduct is taken under color of state law. [*D.T. v. Independent Sch. Dist.*, 894 F.2d 1176 1188 (10th Cir.), *cert. denied*, 498 U.S. 879 111 S.Ct. 213, 112 L.Ed.2d 172 (1990)]. As demonstrated by the above facts, the nexus that was missing in *D.T.* was clearly present in this case. We therefore reject the school's officials' argument that Stroud's acts were not under color of state law."). This statement of the issue begs the essential question.

The concurring opinion concludes that, because (1) the school district placed Stroud in a position of authority, (2) the special attention Stroud gave Doe as her teacher afforded him the opportunity to exert an influence over her, and (3) Stroud used this influence to press his sexual desires upon her, Stroud's manipulative conduct constituted an abuse of power conferred by the state. I agree that the school placed Stroud in a position of authority, that Stroud's position afforded him the opportunity to exert an influence over Doe, and that Stroud used his position in his attempts to persuade Doe to have sex with him. However, "consult[ing] state law" as required by *Bush*, 795 F.2d at 1209, I do not believe that these facts justify finding that Stroud acted under color of state law.

Clearly, the State of Texas did not authorize, "under color of any statute, ordinance, or regulation, custom, or usage," either the sexually fondling of a 15-year old student or statutory rape. In fact, Texas has specifically proscribed such conduct.[22] To paraphrase the majority opinion, "[n]o reasonable public school official in 1987 would have assumed that he could, with [state criminal] immunity, sexually molest a minor student." Maj. op. at __. Thus, the state, by authorizing Stroud to teach students, did not give him the authority to violate state criminal law by sexually abusing his students. Accordingly, it is only in the sense that Stroud had no grant of authority to sexually abuse Doe that one can suggest or argue that Stroud misused or abused his position as a teacher.

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22. *See* Tex.Civ.Prac. and Rem.Code §§ 101.021 and .051 (1986); Tex.Educ.Code § 21.912(b)(1987); Tex. Penal Code § 22.011(a)(2)(1989); *Salinas v. Fort Worth Cab & Baggage* Co., 725 S.W.2d 701 (Tex.1987) (suit against cab company based on its employee's rape of plaintiff). Stroud, in fact, "pled guilty to criminal charges stemming from his molestation of Jane Doe." Maj. op. slip op. at 2867.

Consequently, Stroud, bent upon violating state criminal law, did not act under color of state law when doing so.[23]

Nor is the fact that Stroud used his position as teacher to press his sexual desires upon Doe sufficient to conclude that Stroud acted under color of state law. If misuse or abuse of position was sufficient to demonstrate action occurring under color of state law, then every intentional tort committed by a state official — which is, essentially, what Stroud's conduct amounts to — would give rise to a § 1983 claim. Both the Supreme Court and this Court, however, have rejected this view. *See Parratt v. Taylor*, 451 U.S. 527, 544, 101 S.Ct. 1908, 1917, 68 L.Ed.2d 420 (1981) (noting that not every injury inflicted by a state official acting under color of state law is actionable under § 1983); *Baker*, 443 U.S. at 146, 99 S.Ct. at 2696 (noting that intentional torts do not become constitutional violations merely because the tortfeasors are state officials); *Doe v. State of La.*, 2 F.3d 1412, 1421 (5th Cir. 1993) (concurring opinion) (noting that while "the actions of which Doe complains are egregious", that fact alone "does not mean that he has asserted the violation of a federally protected right, as required by 42 U.S.C. § 1983"); *Fee v. Herndon*, 900 F.2d 804, 808 (5th Cir.) ("[T]he Constitution is not a criminal or civil code to be invoked invariably for the crimes or torts of state educators who act in contravention of the very laws designed to thwart [abuse by teachers]."), *cert. denied*, 498 U.S. 908, 111 S.Ct. 279, 112 L.Ed.2d

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23. The fatal flaw in the majority's analysis can be shown with one hypothetical: assume that a teacher shoots a student for not turning in his or her homework. Following the majority's approach, there exists a "real nexus" between the activity out of which the violation — i.e., the shooting — occurred and the teacher's duties and obligations as a teacher. Thus, the teacher acted under color of state law, and the student may bring a § 1983 action. Consequently, the majority essentially raises to the level of a constitutional violation all torts committed by teachers against students.

233 (1990). In fact, this Court has even held that a rape perpetrated by a state official was not an act under color of state law.[24] *See City of Green Cove Springs v. Donaldson*, 348 F.2d 197 (5th Cir. 1965) (holding that a police officer's rape of an "arrestee" was outside the scope of his employment); *see also Screws*, 325 U.S. at 108-09, 65 S.Ct. at 1039 ("The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States."). Although Stroud unquestionably abused his position as a teacher, he did not abuse the authority granted to him by the state the state — did not grant him any

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24. *See also McLaren v. Imperial Casualty & Indem. Co.*, 767 F.Supp. 1364, 1370-71 (N.D.Tex. 1991) (finding that a sexual assault committed by a police officer was, under Texas law, committed outside the scope of his employment), *aff'd*, 968 F.2d 17 (5th Cir. 1992) (table: unpublished opinion), *cert. denied*, __ U.S. __, 113 S.Ct. 1269, 122 L.Ed.2d 665 (1993); *Smith v. M Sys. Food Stores, Inc.*, 156 Tex. 484, 297 S.W. 2d 112, 114 (1957) (holding as a matter of law that a police officer was not acting within the scope of his employment when assaulting an acquaintance of a woman he had detained); *see also Morgan v. Tice*, 862 F.2d 1495, 1499 (11th Cir. 1989) (holding that a town manager did not act under color of state law when making allegedly defamatory statements about the plaintiff); *Myers v. Morris*, 810 F.2d 1437, 1467 (8th Cir.) (noting that if court-appointed guardians, therapists, and attorneys act beyond the scope of their official duties, they do not act under color of state law), *cert. denied*, 484 U.S. 828, 108 S.Ct. 97, 98 L.Ed.2d 58 (1987); *Bonsignore v. City of New York*, 683 F.2d 635, 638-39 (2d Cir. 1982) (finding that an off-duty police office did not act under color of state law when shooting his wife with his police-issued revolver because "his actions were not 'committed in the performance of any actual or pretended duty,' but were performed 'in the ambit of [his] personal pursuits' ") (citations omitted); *Delcambre v. Delcambre*, 635 F.2d 407 (5th Cir. Unit A Jan. 26, 1981) (finding that a police chief was not acting under color of state law when involved in an altercation with his sister-in-law while he was on duty); *Thomas v. Cannon*, 751 F.Supp. 765 (N.D. Ill.1990) ("Assuming that [the defendant] was clothed in the authority of the state when performing his duties as a [transit worker], the attempt to rape two young girls [was] not an act even remotely related to the performance of his job. Thus, [he had] not acted under color of state law. . . .").

authority, as a teacher or otherwise, to engage in sexual relations with or sexually fondle minor students.[25] Stroud's motive was lust; his intent, perversion; his actions, immoral and criminal — none of which are remotely pedagogic, rather pedophilic.

Accordingly, this case is not similar to *Home Telephone* or *Monroe*, where a state official had authority to take certain actions but exceeded the limits of that authority.[26] Instead, this case is

25. Although the state gave Stroud the authority to teach students, which implicitly gives Stroud the discretion regarding certain matters related to teaching the students, see *supra* note 11, the state did not give Stroud any authority to engage in any type of sexual relationship with students. Thus, this is not a case like *Monroe* — where the state gave police officers the discretion to effect reasonable searches and seizures and then tried to limit the officers' exercise of discretion pursuant to that authority by outlawing unreasonable searches and seizures — but one where the state gave Stroud absolutely no discretion to engage in sexual relations with or sexually fondle his students. Stroud thus had no state-sanctioned power to engage in the acts Doe now challenges.

26. Similarly, *United States v. Price*, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966), involved state officials — and private citizens acting in conjunction with state officials — acting beyond the permissible limits of otherwise legitimate authority granted by the state. In *Price*, the defendant deputy sheriff detained three civil rights workers and then released them from state custody so that he could later intercept them and place them "in an official automobile of the . . . Sheriff's office," and transport them to an area so they could be assaulted and killed. *Id.* at 790, 86 S.Ct. at 1155; *see also id.* at 795, 86 S.Ct. at 1157 ("the brutal joint adventure was made possible by state detention and calculated release of the prisoners by an officer of the State"); *id.* at 796, 86 S.Ct. at 1158 ("it was the purpose of the conspiracy that Deputy Sheriff Price would release [the victims] from custody" so that the other conspirators could kill them); *id.* at 799, 86 S.Ct. at 1159 (noting that the state officials used the state's "sovereign power and office to release the victims from jail so that they . . . could be intercepted and killed"). Because the deputy sheriff exceeded the limits of the authority granted to him by the state — *i.e.*, the authority to arrest persons and release prisoners from state custody — he, along with his coconspirators, acted under color of law.

governed by *Barney* because Stroud had absolutely no state-sanctioned authority to engage in any type of sexual activity with Doe; Stroud, in this regard, had no authority to misuse or abuse. *Cf. Screws*, 325 U.S. at 111, 65 S.Ct. at 1040 ("We are not dealing here with a case where an officer not authorized to act nevertheless takes action."). Because the laws of the State of Texas neither authorized or condoned, but rather proscribed the very acts of which Doe alleges violated her constitutional rights, I would hold that Stroud did not act under color of state law when statutorily raping or sexually fondling Doe. Consequently, Doe does not have a § 1983 cause of action against Lankford and Caplinger based upon their "failures [as] supervisors to prevent substantive due process violations occasioned by their subordinates," and, therefore, I respectfully dissent.

APPENDIX B — JUDGMENT ON REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MARCH 3, 1994

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8431

D.C. Docket No. A-89-CA-271

JANE DOE,

Plaintiff-Appellee,

versus

TAYLOR INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants,

MIKE CAPLINGER, in his Official Capacities and EDDY LANKFORD, in His Official and Individual Capacities,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

Before POLITZ, Chief Judge, GOLDBERG, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO M. GARZA, and DeMOSS, Circuit Judges.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc with oral argument.

Appendix B

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the opinion of the panel of this Court of October 2, 1992 is vacated; the District Court's order denying qualified immunity to defendant Lankford is affirmed; the District Court's order denying qualified immunity to defendant Caplinger is reversed and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellant Lankford pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

March 3, 1994

HIGGINBOTHAM, Circuit Judge, with whom POLITZ, Chief Judge, joins, concur.

GARWOOD, Circuit Judge, with whom JONES, SMITH, BARKSDALE, EMILIO M. GARZA, and DeMOSS, Circuit Judges, join, dissent.

JONES, Circuit Judge, with whom GARWOOD, SMITH BARKSDALE, EMILIO M. GARZA, and DeMOSS, join, dissent.

EMILIO M. GARZA, Circuit Judge, concurs in part and dissents in part.

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION ENTERED AUGUST 22, 1991

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE	§	
	§	
VS.	§	
	§	CAUSE NO. A-89-CA-271
TAYLOR INDEPENDENT SCHOOL DISTRICT, ET AL	§	
	§	
	§	

MEMORANDUM OPINION

Regarding Defendants' Motion for Summary Judgment and *Defendants' Good Faith Qualified Immunity Defense*

Before the Court is the Court's June 8, 1990 Order regarding the defendants' May 1, 1990 Motion to Dismiss and Alternative Motion for Summary Judgment. On page 7 of the third full paragraph of the Court's June 8, 1990 Order, the Court stated that it would issue a detailed memorandum opinion on this matter in a separate document. The memorandum opinion mentioned in that paragraph is the subject of this document.

On June 8, 1990, the Court denied Defendants Lankford and Caplinger's Motion for Summary Judgment based on a good-faith, qualified immunity defense.

Defendants Lankford and Caplinger ("the defendants") have taken an interlocutory appeal of this issue, certified by the Court's Order of June 8, 1990.

The Court notes that Defendant Taylor Independent

School District (TISD) is not entitled to a good-faith, qualified immunity defense because it was sued only in its official capacity. *Familias Unidas* v. *Brisco*, 619 F.2d 391, 403 (5th Cir. 1980). Further, the Court notes that Mr. Stroud has filed for personal bankruptcy and that he has not joined in the Defendants' Motion for Summary Judgment. Thus, the Court's opinion below concerns only Defendants Lankford and Caplinger in their individual capacities. The Court will refer to Defendants Lankford and Caplinger as "the defendants." The Court will refer to Defendant Stroud as "Mr. Stroud."

I. STANDARD OF REVIEW

The Court may grant summary judgment under F.R.Civ.P. 56(c) only if (1) the record reveals no genuine issue as to any material fact, and (2) the proving party is entitled to judgment as a matter of law. *Celotex Corp.* v. *Catrett*, *106 S.Ct. 2548, 2552-53 (1986). In deciding whether to grant summary judgment, the Court should review the evidence in the light most favorable to the party opposing summary judgment and indulge all reasonable inferences in favor of that party. Pharo* v. *Smith*, 621 F.2d 656, 664 (5th Cir. 1980). In this case, the plaintiff is the party opposing summary judgment; therefore, the Court will review the evidence in the light most favorable to the plaintiff.

II. STATEMENT OF FACT AS ALLEGED BY THE PLAINTIFF

Below are the facts presented in the light most favorable to the plaintiff, as drawn from affidavits and depositions submitted by the plaintiff as exhibits to the plaintiff's Response to the defendants' Motion for Summary Judgment.

Mr. Stroud, teacher and coach for almost 20 years, had

been employed by Taylor ISD since 1981-82. Defendant Lankford became principal and immediate supervisor of Stroud, the offender, in the 1983-84 school year. Defendant Caplinger became Superintendent of Taylor ISD in July of 1986.

A. Caplinger's & Lankford's Failure to Respond to Stroud's Prior Pattern of Conduct.

Beginning in at least 1984-85, the plaintiff can document both (1) Mr. Stroud's pattern of sexual harassment or "sexually oriented favoritism" toward freshman or 9th grade girls in his biology class and (2) the common knowledge of such conduct on the part of the Taylor High School community, including Defendants Lankford and Caplinger.

The first student about whom the plaintiff has clear evidence is Cherry Fugate, a 9th-grade freshman in the 1984-85 school year. Although Mr. Stroud had no responsibilities to the girls' athletic teams, he would "hang around" Cherry's volleyball and basketball games. He wrote Cherry notes and signed them, "Love You." He gave her gifts. He walked her to class. He called her at home.

Open teasing went on among students and other teachers concerning the relationship between Mr. Stroud and Cherry Fugate. The unusual nature of his attentions to Cherry was apparent to the Taylor High School community according to this victim, Cherry Fugate, and numerous other members of the Taylor High School community, including: Mr. Kuhl and Mr. Potts, both coaches at Taylor High School; Colleen Leschber, student at Taylor High School, who first heard of the incident when she was in 8th grade at Taylor Middle School; Chad Lincoln, a student at Taylor High School; Sheri Snook, a student who started Taylor High School as a 9th-grade freshman in 1985-86 and was assigned to Mr. Stroud's biology class; Kim Caesar, former Taylor High

student, currently an elementary school teacher; and Lee Ann Mueller, student at Taylor High School, two years behind Cherry Fugate.

Mr. Stroud testified under oath in sworn deposition that Defendant Lankford knew of Stroud's involvement with Cherry Fugate and that Defendant Lankford had discussed the matter with him.

In September of the 1985-86 school year, a new and different 9th-grade freshman, Sheri Lynn Snook, became the victim of Mr. Stroud's sexual harassment according to the depositions of Mr. Stroud, Cherry Fugate, and this victim, Sherri Snook. In a similar manner, according to both the offender, Stroud, and the victim, Sheri Snook, Mr. Stroud gave Sheri gifts, walked her to class, called her at home from school property (the high school field house), hugged her and put his arms around her.

Attached to his deposition are notes which Stroud wrote to Sheri Snook and delivered to Sheri at school. These notes were signed, "Love, Me," and contained many references to Sheri Snook's physical appearance. Stroud also expressed jealousy toward Sheri Snook's teenage boyfriend in these notes. According to both Snook's and Stroud's depositions, Mr. Stroud encouraged the girl to keep his notes secret because he feared that people would "misinterpret" his note writing if it were discovered.

Despite Mr. Stroud's efforts, the plaintiff has ample evidence that Stroud's harassment of Sheri Snook was well-known in the Taylor High School community. According to the depositions of Sheri Snook and fellow student Lee Ann Mueller, students and other teachers were aware of Mr. Stroud's notes to Sheri. Sheri Snook testified that she was teased by students and coaches about her relationship with Mr. Stroud. According to her testimony, Mr. Kuhl, a coach

at Taylor High School, even suggested that she was having sexual relations with Mr. Stroud.

In the fall of school year 1987-88, Stroud again exhibited this pattern with a third 9th-grade freshman girl. This time it was the plaintiff, Jane Doe. Numerous members of the Taylor High School community again noticed the offender's pattern of sexual harassment of 9th-grade freshman girls enrolled in his biology class, including Mr. Potts, a coach at Taylor High School, and Sheri Snook, Colleen Leschber and Lee Ann Mueller, all students at Taylor High School.

Additionally, the plaintiff alleges that Stroud's general practice of differential treatment in his classroom toward female students was evident to the community. The depositions of the plaintiff, Cherry Fugate, Sheri Snook and Kim Caesar support the plaintiff's allegations. According to Stroud, himself, Cherry Fugate, Kim Caesar and the plaintiff, Stroud would give his "favorite girls" (female students) higher grades for less work, allow them to drive his pickup truck without a driver's license, write excuses for them if they were tardy or missed assignments, and would intercede with other teachers to get their grades improved.

Defendant Lankford's knowledge of Stroud's conduct is evident through the testimony of Mary Jean Livingood, the Taylor High School librarian. She heard many complaints of Stroud's favoritism toward his female students. On numerous occasions, she witnessed, this teacher hugging, touching and engaging in unprofessional behavior with female students in the halls of Taylor High School. She reported these observations and complaint to Eddy Lankford during the 1985-86 school year.

According to the librarian's testimony at her deposition, Mr. Landford indicated to her that he would talk to the school's athletic director, Eddie Spiller, about the offender's

conduct. According to the deposition testimony of the athletic director, Eddie Spiller, Mr. Lankford never discussed the matter with Mr. Spiller.

According to his own deposition, Mr. Landford made no documentation of Ms. Livingood's reports or any other report he received of Mr. Stroud's behavior.

In the spring of 1986, Ms. Livingood, the school librarian, again observed Mr. Stroud's harassment of female students. This time, according to her deposition testimony, she observed Mr. Stroud handling a female student in a very personal way in the xerox room of the school library. She again reported the incident to Mr. Lankford, the school principal. This time she reported the incident the day that it happened, telling him that it looked like "child molestation." Mr. Lankford claims to have received only one complaint from Ms. Livingood; however, neither complaint was documented according to Lankford's deposition. According to Mr. Stroud's deposition, Mr. Lankford never talked with Stroud about the incident.

By August of 1986, one month after becoming superintendent, Defendant Caplinger received reports that Coach Stroud gave female students special privileges in his biology classes. According to Caplinger's deposition, he heard in August 1986 that Stroud allowed girls to record grades in the grade book and allowed girls to be dismissed from class early. According to Defendant Caplinger's own deposition, Caplinger did not document these reports. He admits that his recollection of the reports is hazy. He claims that he asked Defendant Lankford to talk with Mr. Stroud about Stroud's favoritism; however, Stroud does not recall discussing the reports with Defendant Lankford.

The plaintiff, Jane Doe, started high school at Taylor High School in the fall of 1986. She was assigned to Mr. Stroud's

biology class. This time, the plaintiff, Jane Doe, was the student that Stroud singled out. Stroud's harassment of her followed the pattern he demonstrated with Cherry Fugate and Sheri Snook.

B. Lankford and Caplinger's Failure to Respond to Stroud's Conduct Toward the Plaintiff

According to the plaintiff, Mr. Stroud, and Lee Ann Mueller, Stroud began his harassment of the plaintiff by writing notes to the plaintiff on her test papers. He said things like "Hi pretty" and "You look really nice today." Mr. Stroud carried on correspondence with the plaintiff, just like he had with other freshman girls in earlier years. According to his own deposition, Stroud encouraged the plaintiff to treat him as a friend and confidant, as he had "encouraged" other girls.

In November, 1986, Mr. Stroud furthered his sexual harassment and began his sexual assault on the plaintiff by grabbing the plaintiff and kissing her at the field house after a basketball game.

Mr. Stroud's harassment of the plaintiff continued via Sunday basketball games at the field house. According to Stroud's deposition and according to Lee Ann Mueller's deposition, Stroud would arrange to meet the plaintiff and other children at the field house on Sundays to play basketball. He introduced the plaintiff to his teenage daughter, Marcie. The plaintiff and Marcie became friends.

During the fall and spring, Stroud's sexual harassment/assault of the plaintiff escalated during and after school hours. Stroud kissed, petted and engaged in foreplay toward the plaintiff, both on and off school property. According to the depositions of the plaintiff, Stroud, Lee Ann Mueller, and Brittani Barron, Stroud called the plaintiff

at home many times on her private line and allowed her to call him at the field house. He took the plaintiff out of his classroom during class hours into the adjoining lab room, where he would sexually harass/assault her by kissing and touching her in a sexual manner. He would also call her out of other teachers, classrooms to engage in this behavior in the lab room.

In January, 1987, Stroud took the plaintiff to a concert in Austin, bought her alcohol, and sexually harassed/assaulted the plaintiff by kissing her. After the concert, Stroud sexually assaulted the plaintiff at the Taylor High School field house by "heavy petting," kissing and undressing the plaintiff. Stroud sexually harassed/assaulted the plaintiff by unbuttoning the plaintiff's pants and blouse, touching her breasts and genitals, kissing the plaintiff and asking the plaintiff to have sexual intercourse with him. The plaintiff refused.

After a Valentine's Day dance, the plaintiff spent the night at Stroud's house. Stroud used his own teenage daughter as a pretext to persuade the plaintiff to spend the night. Again, the plaintiff refused to have sexual intercourse with him.

Several students, including Lee Ann Mueller, Gary Faltesek, Colleen Leschber, Tammy Moeller, Sheri Snook and Brittani Barron became aware of Stroud's sexual harassment and abuse of the 14-year-old plaintiff. Most of these students were aware of Stroud's prior sexual harassment of other teenage girls.

Stroud persisted in sexually harassing/abusing the plaintiff. Around Valentine's Day, 1987, Stroud gave the plaintiff a Valentine in class. The Valentine read, "To my most favorite, prettiest, sweetest, nicest, sweetheart in the world! Please don't change cause I need you. I'm in love with you. Forever — for real — I love you." This is documented in the

deposition of the school guidance counselor, Naomi Paseman, in the deposition of Stroud, and in the deposition of student Brittani Barron.

Brittani Barron found the Valentine in the plaintiff's purse and took it to Defendant Lankford. Ms. Pasemann was also present. Brittani told Defendant Lankford and Ms. Paseman that she found the Valentine in the plaintiff's purse and that Stroud had sent it to the plaintiff. Brittani told Ms. Pasemann that Stroud had kissed the plaintiff and that she thought that they were having sexual intercourse.

According to both Defendant Lankford's and Naomi Pasemann's depositions, Lankford and Pasemann discussed the conversations they both had with Brittani.

According to Brittani Barron's deposition, when Brittani told Defendant Lankford, himself, that she thought Mr. Stroud was sexually abusing the plaintiff, Defendant Lankford told Brittani that he was aware of the rumors surrounding Mr. Stroud and the plaintiff. According to Brittani's deposition, Defendant Lankford told her that Mr. Stroud just had a way of flirting with the girls.

According to the school guidance counselor, Naomi Pasemann's deposition, Brittani Barron's deposition, and Mr. Stroud's deposition, Defendant Lankford did nothing but transfer Brittani out of Stroud's class, an act which could be interpreted as protecting Stroud's illegal conduct.

Parents, other faculty at Taylor High School, the plaintiff, other students, both male and female, all noticed Stroud's blatantly differential treatment toward females in his biology class. According to parents, faculty, the plaintiff and other male and female students, Stroud allowed those girls in his class who flirted with him to grade tests and enter grades in his grade book. He allowed them to put down better grades

for themselves and their friends than for other male or female students. He allowed those girls to receive good grades without effort. He gave these girls hints on tests and encouraged them to congregate around his desk during class. He allowed them to drive his pickup, even though they did not have driver's licenses. He wrote passes for them to leave class or to leave school during school hours. He graded them more favorably than other students. He would eat lunch with his favorite female students. He made sexually suggestive comments in the classroom and used and allowed students to use abusive language.

Parents, faculty and other students reported Stroud's differential conduct and sexual harassment to Defendant Lankford. Naomi Pasemann, the school counselor, reported Mr. Stroud's conduct to Defendant Lankford at least twice during the 1986-87 school year. She also reported the complaints which she received from other faculty, students and parents.

Brittani Barron, a student at Taylor High School, and her father, Bruce Barron, relayed their concerns that Stroud was sexually harassing or assaulting the plaintiff, to Naomi Pasemann, who then relayed these concerns once again to Defendant Lankford.

During the spring of 1987, Stroud's harassment/abuse of the plaintiff was common knowledge among faculty, staff, parents, and students. Both Mr. Spiller and Mr. Schroeder, Taylor High School's athletic directors, knew of Stroud's conduct. Mr. Jones, a coach at Taylor High School, knew about Stroud's behavior. Mr. Potts, a teacher and coach at Taylor High School, knew of Stroud's conduct.

On February 20, 1987, Mr. Miller, Assistant Principal to Taylor Middle School, reported to Superintendent Caplinger

that Stroud had behaved unprofessionally with the plaintiff at a basketball game. Mr. Miller reported Stroud's unprofessional conduct because he had heard rumors about Stroud's sexual behavior toward the plaintiff.

According to his own deposition, Defendant Caplinger discussed Mr. Miller's report with Defendant Lankford and the athletic director, Mr. Spiller.

According to Defendant Lankford, Mr. Spiller reported to Defendant Lankford that Mr. Spiller had, previous to Mr. Miller's report, spoken with Stroud very seriously about Stroud's behavior. According to Defendant Lankford, Defendant Lankford discussed Mr. Spiller's report to Lankford with Caplinger; however, according to his own testimony, Defendant Lankford did not question Mr. Spiller about why he had spoken to Stroud about his behavior prior to Mr. Miller's report. Lankford claims to have relayed most of the reports he received about Stroud to Defendant Superintendent Caplinger; however, Defendant Superintendent Caplinger denies having received knowledge of Stroud's conduct between August, 1986, and Mr. Miller's report in February, 1987. Defendant Caplinger further denies receiving any further reports of Stroud's behavior during the spring of 1987. *See* pages 150-170 of Lankford's deposition, especially pages 159-161.

In March or April, 1987, Stroud had sexual intercourse with the plaintiff at his home. The plaintiff was 15 years old and had not had sexual intercourse prior to that time. Stroud used his daughter, Marcie, as a pretext to lure the plaintiff to spend the night with Stroud. Over the next several months, Stroud had sexual intercourse with the plaintiff in a variety of places, including the high school field house, in the countryside near the school, and at Stroud's home. At least twice

Stroud engaged in oral-genital sexual contact with the plaintiff.

In June, 1987, Stroud took the plaintiff, her female cousin, and his daughter to the Corn Festival in Holland, Texas. He provided alcohol to the girls, and the plaintiff and her cousin got drunk. After Stroud's wife became angry with Stroud because he was dancing with the plaintiff, Stroud left the Corn Festival and took the plaintiff out into the country in his truck, where he had sexual intercourse with the plaintiff. Stroud returned to the Corn Festival with the plaintiff, retrieved his daughter and the plaintiff's cousin, and took them to his house, where they all spent the night. Stroud had sexual intercourse with the plaintiff again that night in his home. (According to Stroud's own deposition, and according to the depositions and affidavits of Tammy Moeller, the plaintiff's cousin, Brandy Poston, and Lee Ann Mueller, Stroud often bought alcohol for the plaintiff and other underaged high school girls.)

Having witnessed Stroud's improper conduct at the Corn Festival, two concerned parents, Mr. Warner and Mr. Leschber, reported Stroud's behavior at the Corn Festival to Defendant Superintendent Caplinger on approximately July 2, 1987. These parents told Defendant Superintendent Caplinger that Stroud had been inappropriate in his contact with these girls and that the girls may have gone home alone with Stroud after the festival. They reported Stroud's favoritism in the classroom.

According to Defendant Caplinger, he telephoned the parents of one of the girls mentioned by Mr. Warner and Mr. Leschber. Her parents told him that she had not been to the Corn Festival. Defendant Caplinger dismissed the entire report by Mr. Warner and Mr. Leschber as untrue and did not contact the plaintiff's parents. According to Stroud's

deposition, no one ever mentioned to him that his behavior at the Corn Festival was inappropriate.

Defendants Lankford and Caplinger received another complaint regarding Stroud on or about July 15, 1987. The plaintiff's parents found photos of Stroud among the plaintiff's possessions. These photos had handwritten notes from Stroud on the back of them. These notes were similar to the Valentine that Brittani gave to Defendant Lankford in February, 1987. The notes included such remarks as, "please don't ever change and don't ever leave me. I want to be this close always—I love you—Coach Lynn Stroud."

Immediately upon finding the notes, the plaintiff's parents turned the photos and notes over to Defendant Caplinger. According to the plaintiff's mother's affidavit, Defendant Caplinger had heard other rumors about Coach Stroud and other students, including the plaintiff.

Although Mr. Caplinger indicated to the plaintiff's parents that he would convene a meeting of all parties concerned, including the offender, his superiors, and the plaintiff's parents, no such meeting was held.

According to Defendant Lankford's affidavit Defendant Caplinger showed the photo/notes to Lankford. Lankford met with Stroud and warned Stroud that he would be fired "if there were something going on."

According to the plaintiff's affidavit, she didn't see Coach Stroud "for about a month" after her parents' meeting with Defendant Caplinger. Coach Stroud called her in August to find out what she had said at the meeting with Defendant Caplinger. He continued to call her.

In September, 1987, when school started again, Coach Stroud "started walking [the plaintiff] to classes and stuff again." Her October 12, 1987 affidavit states:

I told him to "Stop It," but he never did stop walking with me to my class, and it just started up again. Coach Stroud started writing me letters again saying that he would call me (at home), like at 6:30 PM or 7:00 PM. This was about a week after school started. Then Coach Stroud started tell (sic) me what time to meet him, sneaking out, late, he would pick me up and we would go to the fieldhouse or just ride around. When Coach Stroud and I would ride around he would stop his truck, like out in the county and we had intercorse (sic). When Coach Stroud and I went to the field house we would have intercorse (sic). Coach Stroud used protection, a Condom. Coach Stroud and I kept doing this until I guess last week or until my parents of this lawyer (sic). The last time Coach Stroud and I had intercorse (sic) was, (sic) Tues. after one o' my vollyball (sic) games, it was a out of town game, we were playing Waco, about two weeks ago, it was either the 22nd or 29th of Sept., 1987. I sneaked out of the house and meet (sic) Coach Stroud and we went to the fieldhouse and had intercorse (sic). The time before this that Coach Stroud and I had intercorse (sic) at the fieldhouse was after the Rockdale football game, Sept. llth, 1987.

Wed. (10-7-87) my father, [name deleted] took me in to talk with their lawyer, Richard Hickok and he taped our conversion (sic). I told Mr. Hickok the truth about Coach Stroud and myself and that we have had intercorse (sic). This was the first time I have ever told anyone the whole truth about it. During the time Coach Stroud and I were having a relationship sexually, I never told him "No" because I just did not know what to say and I was scared. If I told him "No" I really did not know what he would do. I guess I throught (sic) Coach Stroud would just turn on me completely. Coach Stroud did tell me that if anyone knew about us that he could loose (sic) his job, family.

III. STATEMENT OF APPLICABLE LAW

A. Summary Judgment Standard

The Court may grant summary judgment under

F.R.Civ.P. 56(c) if the record reveals no genuine issue as to any material fact, and (2) the proving party is entitled to judgment as a matter of law. *Celotex Corp.* v. *Catrett*, 106 S.Ct. 2548, 2552-53 (1986). In deciding whether to grant summary judgment, the Court should review the evidence in the light most favorable to the party opposing summary judgment and indulge all reasonable inferences in favor of that party. *Pharo* v. *Smith*, 621 F.2d 656, 664 (5th Cir. 1980); *Jacobs* v. *Provident Life & Accident Ins.*, 837 F.2d 213, 215 (5th Cir. 1988).

A short review of the defendants' Motion and the plaintiff's Response reveals that a substantial question of material fact exists in this case. The defendants are not entitled to judgment as a matter of law, as set out below.

B. Law Governing Qualified Immunity Defense

The question before the Court is whether the facts, as alleged by the plaintiff, support a claim of violation of clearly established statutory or constitutional rights of which a reasonable person would have known. *Brawner* v. *City of Richardson*, 855 F.2d 187, 190-191 (5th Cir. 1988); *Thompson* v. *City of Starkville*, Miss., 901 F.2d 456, 459 (5th Cir. 1990); *Mitchell* v. *Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); and *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 S.Ct. 2727, 2738, 73 L. Ed.2d 396 (1982).

Specifically, *Brawner* requires a two-step process:

(1) the initial determination is whether the claim itself is viable, whether the . . . plaintiff [is] constitutionally protected " and "

(2) if so, the next step is an evaluation of whether the "constitutionality right asserted was 'clearly established' at the time of [the public official's] conduct so that a reasonable official would have understood that his conduct violated that right." *Brawner*, 855 F.2d at 191.

Mitchell v. *Forsythe*, 472 U.S. 511, 105 S.Ct. 2806 (1985), additionally requires that the plaintiff produce evidence sufficient to create a genuine issue of material fact as to whether defendants in fact violated those rights.

IV. ANALYSIS

A. The Plaintiff is Constitutionally Protected.

The plaintiff has a constitutional right to be free from bodily harm via the substantive Due Process Clause of the Fourteenth Amendment. *Rochin* v. *California*, 342 U.S. 165, 172-74, 72 S.Ct. 205, 210 (1952).

According to *Rochin*, the court should consider whether the conduct itself "shocks the conscience." *In Jefferson* v. *Ysleta Independent School District*, 817 F.2d 303, 305 (5th Cir. 1987), the Fifth Circuit Court of Appeals affirmed Judge Bunton's shocked conscience, stating:

> . . . in January, 1985, a competent teacher knew or should have known that to tie a second grade student to a chair for an entire school day and for a substantial portion of a second day, as an educational exercise was . . . constitutionally impermissible.

(as quoted in *Savidge* v. *Fincannon*, 836 F.2d 896, 909 (5th Cir. 1988).

This Court would argue that in this case in the school years 1986-87 and 1987-88, the defendants knew or should have known that to tolerate a high school biology teacher who courts, seduces, sexually molests, and statutorily rapes a ninth grade student for an entire school year and a portion of another school year, for any reason, was at least as constitutionally impermissible as the conduct described in the *Ysleta* case.

If the conduct of the defendants, as principal and superin-

tendent of a high school and school district, respectively, does not shock the conscience of the court, then the court's conscience has become seriously eroded.

Like the second grader tied to a chair for a day and a half, unable to go to the bathroom, the plaintiff in this case was tied to an awful secret for more than a year, a secret which deprived her of a normal social and intellectual high school career. Separated from her peers, she finished high school in another district.

There can be no doubt that the facts alleged demonstrate that the plaintiff was deprived of bodily integrity and that she was subject to bodily harm. Likewise, the facts alleged clearly demonstrate the defendants, knowledge of Stroud's inappropriate conduct.

Further, the plaintiff has a constitutional right to an education that is equal to that of male students under the equal protection clause of the Fourteenth Amendment, as well as under other federal statutes. She has a constitutionally protected right to an education that is free from the hostile environment created by sexual harassment. She has a right to be free of sexual discrimination at school.

In *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 2409 (1986), the Supreme Court ruled that "hostile environment" sexual harassment is a form of sex discrimination prohibited by Title VII. If "hostile environment" sexual harassment of women in the work place (women, who are legally free to terminate employment rather than reveal the harassment to others, or tolerate the harassment) is unconstitutional, as held by the Supreme Court, then the toleration of sexual molestation or harassment of a child at school (lasting for more than one year, a child who is not legally free to leave school, but must choose between admitting (1) the

heinous acts described revealing the secret imposed by an authority figure, or (2) suffering the abuse) is equally unconstitutional.

The Constitution, which protects women in the work place, must extend to women in high school. Although still minors, high school females, as evidenced by the facts alleged in this case, face the same type of "hostile environment" sexual harassment and actual sexual abuse as women in the work place. In this case, the constitutional violation is exacerbated by the plaintiffs, *involuntary* attendance at school and her lack of understanding and experience.

To decline constitutional protection to underage females but to extend such protection to working women, is to undermine the entire policy behind extending such protection to working women in the first place. In cases such as *Meritor*, the Supreme Court has clearly stated that authority figures who knowingly tolerate abusive, inappropriate, sexual conduct in subordinates will be held liable for such conduct. Public policy dictates that people be free from such abuse whether at the work place or at school. In this case, school was as much the plaintiff's work as the working world was to the woman in *Meritor*.

B. Such Protection Was 'Clearly Established'

According to *Thompson*, 901 F.2d at 459 (5th Cir. 1990), whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken . . ." *Anderson* v. *Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).

Thus, the inquiry in the instant case turns on whether,

assuming the plaintiff's allegations to be true, Lankford and Caplinger violated rights of the plaintiff that were clearly established at the time of their actions. That is, whether the individual defendants would reasonably have known that their actions would violate the plaintiff's Fourteenth Amendment right to equal protection. "Clearly established" means that the contours of the right were so clear at the time the officials acted that a reasonable official would have understood that he violated that right. The very action in question need not have been previously held unlawful; the unlawfulness of the action must be apparent in light of pre-existing law. See *Thompson* and *Brawner*.

In determining what a reasonable school administrator should know in this instance, it is not necessary to point to a precedent which is on all-fours with the case at bar. It suffices that the official be aware of general, well-developed legal principles. *Jefferson* v. *Ysleta ISD*, 817 F.2d 303, 305 (5th Cir. 1987). *CF. Sourbeer* v. *Robinson*, 791 F.2d 1094 (3rd Cir. 1986), *cert. denied*, ... U.S. ...., 107 S.Ct. 3276, 96 L.Ed.2d .... (1987).

A person's constitutional right to be free from bodily harm occasioned by state officials was established in 1952 by the Supreme Court in *Rochin* v. *California*, 342 U.S. 165, 172-74, 72 S.Ct. 205, 210 (1952).

In May, 1987, in *Jefferson* v. *Ysleta ISD*, 817 F.2d 303, 305 (5th Cir. 1987), the Fifth Circuit made crystal clear the right clearly established by previously well developed legal principals. Citing *Schillingford* v. *Holmes*, 634 F.2d 263, 265 (5th Cir. 1981), which cites *Hall* v. *Tauney*, 621 F.2d 607, 613 (4th Cir. 1980), the Fifth Circuit in *Ysleta*, stated:

> the right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process .... The same

> applies to state-occasioned restraints which are not justified by the victim's conduct or other extenuating circumstances.

Jefferson v. *Ysleta ISD*, 817 F.2d at 305 (5th Cir. 1987). The defendants' restraint, a conspiracy of silence, was not justified by the plaintiffs' conduct nor by any other circumstances.

The plaintiff's right to freedom from "hostile environment" sexual discrimination was well established by the Supreme Court in June, 1986, in the *Meritor* case. *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 206 S.Ct. 2399, 2409 (1986). Further, Title VII and Title IX issues were at the forefront of education law in the 1970's and 1980's. Aggravated sexual assault statutes existed in 1986 and 1987 and had been long standing and well established in Texas. (*See* § 22.011f.f. Texas Penal Code, as amended in the 1985 Reg. Session, effective September 1, 1985.)

The defendants argue in essence that there is no "White Horse" Fifth Circuit case law which clearly establishes the plaintiff's constitutional right. A "White Horse" case is not required under *Ysleta*, 817 F.21d 303, 305 (5th Cir. 1987). *See* fn 1.

The defendants' reliance on *DeShaney* and *Stoneking* is misplaced. *DeShaney* v. *Winnabago County Department of Social Services*, 489 U.S. . . . , 109 S.Ct. 998, 103 L.Ed.2d 249 (1989); *Stoneking* v. *Bradford Area School District I*, 856 F.2d 594 (3rd Cir. 1988), vacated and remanded, 109 S.Ct. 1333 (1989) (*Stoneking II*), 882 F.2d 720 (3rd Cir. 1989, *cert. denied*, 110 S.Ct. 840 (1990).

The defendants argue that because a "duty to protect" was not established by the U.S. Supreme Court until 1989 in the *DeShaney* case, the plaintiff's rights could not have been "clearly established" at the time of the defendants' conduct.

This argument fails for two reasons. (1) As stated earlier, the plaintiff does not allege a "duty to protect." The defendants' deliberate indifference to the plaintiff's rights, the defendants' toleration of Stroud's known behavior are the issues in this case. Any reasonable person would have or should have known that Stroud's conduct was illegal and that toleration of such conduct by his employer and immediate supervisor would violate the plaintiff's known rights. (2) Further, the law does not require a U.S. Supreme Court case, or even a "white horse" case. *Ysleta*, 817 F.2d 303, 305 fn. 1 (5th cir. 1987). The law only requires that the conduct be proscribed under general, well-developed legal principles. *Ysleta* at 305.

The defendants claim that because *Stoneking I* was remanded by the U.S. Supreme Court for analysis in light of *DeShaney*, the law cannot be considered "clearly established;" however, the U. S. Supreme Court denied certiorari to the school district challenging the *Stoneking II* court and allowed a judgment to stand against a school district on facts very similar to these.

The defendants argue that because the plaintiff was not physically restrained by state authority, the defendants could not have known that her Fourteenth Amendment rights were compromised. Citing *Ingraham* v. *Wright*, 430 U.S. 651, 670, 97 S.Ct. 1401, 1412, 51 L.Ed.2d 711 (1977), the defendants argue that "even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment." Unfortunately, the record in the case before the Court is replete with numerous cries of "foul" from friends (Mr. Warner and Mr. Leschber), family (Plaintiff's mother and father), other teachers (the school guidance counselor and the school librarian), and

other pupils (Brittani Barron) and even from a fellow principal (Mr. Miller, cries of "foul" that fell on deaf ears! When the protests of the entire community are ignored by the officials responsible, or when the officials are deliberately indifferent to the pleas for action made by the community, as the facts presented here indicate, the policy stated by *Ingraham* is abrogated and cannot hold.

C. The Evidence Presented Produces a Genuine Issue of Material Fact

Because the defendants and the plaintiff do not agree on the facts, and because the plaintiff has presented voluminous records to the Court that support the facts alleged by the plaintiff, the plaintiff has met the burden set forth in *Mitchell* v. *Forsythe*, 472 U.S. 511, 105 S.Ct. 2806 (1985).

This Court finds that a reasonable trier of fact could find a violation of the plaintiff's clearly established constitutional rights. The plaintiff's allegations and the acts of the individual defendants should be submitted to the jury.

More specifically, the defendants' conduct, especially that of Defendant Lankford, could be construed as tacit approval of or even vicarious complicity with Stroud's conduct. Certainly the professionals on Defendant Lankford's staff, such as the librarian and the guidance counselor who spoke to Mr. Lankford repeatedly regarding Stroud's conduct without result, must have sensed Lankford's complicity or protection of the offender, Stroud. Certainly the students, who heard of Stroud's conduct in junior high school and then lived through it in high school, observed the administration's complicity. Students, such as Brittany Barron, who found the courage to confront Mr. Lankford regarding Stroud's conduct were routinely ignored. Even the assistant principal of the junior high school, Mr. Miller, a professional colleague of Lankford and Caplinger, was ignored.

In the Court's opinion, these issues should be submitted to the jury. While the defendants may not have held a "duty to protect" the plaintiff, they certainly had a duty to respond to the parents, teachers, students and fellow administrators, blatant protests against the offender's conduct. Under the U.S. Supreme Court opinion in *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 2409 (1986), the defendants had a duty to eradicate from the work place and by analogy, the students' learning environment, that which produced "hostile environment" sexual discrimination. Defendants Lankford and Caplinger personally tolerated a pattern of conduct which violated a clearly established constitutional or statutory right. The conduct of defendants Lankford and Caplinger, as alleged by the plaintiff, raises a reasonable question of fact: "Did the defendants tolerate Stroud's abuse to the point that they actually condoned the abuse?"

The facts presented and the law at the time demonstrate that a reasonable official would have understood that his conduct violated the plaintiff's right to equal protection.

The defendants argue that a student has no constitutionally protected right to a *safe* environment in school. *Grubbs* v. *Aldine Independent School District*, 709 F.Supp. 127, 130 (S.D. TX 1989). The Court would argue that *safety* is not the issue in this case. Known "hostile environment" sexual harassment in violation of the equal protection clause and other federal statutes is the issue.

At the very least, the defendants deprived the plaintiff of a free, *appropriate* education without due process of law.

It is therefore the ORDER of the Court that Individual Defendants Lankford and Caplinger's Motion for Summary Judgment on the basis of qualified immunity be in all things DENIED.

Appendix C

SIGNED and ENTERED this *22nd* day of August, 1991, at Austin, Texas.

STEPHEN H. CAPELLE
UNITED STATES MAGISTRATE

1:89-CV-00271

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APPENDIX D — FINAL JUDGMENT AND ORDER IN *VON DREHLE, ET AL. v. HOUSTON INDEPENDENT SCHOOL DISTRICT, ET AL.* FILED NOVEMBER 27, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-88-539

WILLIAM VON DREHLE, et al.,

Plaintiffs

vs.

HOUSTON INDEPENDENT SCHOOL DISTRICT, et al.,

Defendants.

FINAL JUDGMENT

The Court having GRANTED Defendants Raymond, Westmoreland, English and the Houston Independent School Districts' motions for summary judgment, this case is hereby DISMISSED with prejudice as to these Defendants only.

This is a FINAL JUDGMENT.

Signed this 21st day of November, 1989 at Houston, Texas.

s/ Norman W. Black
NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CIVIL ACTION NO. H-88-539

WILLIAM VON DREHLE, et al.,

Plaintiffs

vs.

HOUSTON INDEPENDENT SCHOOL DISTRICT, et al.,

Defendants.

ORDER

Pending before the Court are Defendants' motions to dismiss and/or for summary judgment. Defendants Raymond, Westmoreland and English filed their original motion and request for sanctions in June 1989. In September a subsequent motion for summary judgment was filed by these Defendants along with Defendant Houston Independent School District ("HISD"). Defendant Lacy filed a motion to dismiss on October 17, 1989.

This case was set for docket call on October 30, 1989 with a joint pretrial order due on October 25. Since the Plaintiffs had failed to respond to the motions for summary judgment or appear for the depositions scheduled by Judge Botley, a hearing was held on October 20 at which time Plaintiffs' attorney was to show why the relief requested by Defendants Raymond, Westmoreland, English and the HISD should not be granted. After listening to the excuses of counsel, the Court ordered him to file a written response within five days; but, the Court would not guarantee that the

response would be considered due to its untimeliness. On October 27 a pleading entitled "Plaintiff's (sic) Motion for Leave to File Response to Various Defendants' Motion for Summary Judgment and to Amend Plaintiffs' Complaint and Proposed Response" was filed. The Court reviewed this pleading and will consider the proposed response. However, it will not allow Plaintiffs to file an amended complaint at this late date.

Summary judgment is authorized if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The United States Supreme Court has interpreted this rule to mandate the entry of summary judgment after an adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

This case was filed pursuant to 42 U.S.C. § 1983 by the next friend of three minors who were special education students in the HISD. It is alleged that Defendant Lacy, a substitute HISD bus driver, sexually molested the minor Plaintiffs on one occasion in December 1986. Plaintiffs contend the children had a constitutionally protected property or liberty interest in a safe environment while on a school bus. They also allege the HISD's wrongdoings consisted of hiring and improperly training Defendant Lacy that the other Defendants owed Plaintiffs a duty of care. Plaintiffs conclude these Defendants were grossly negligent and/or had a callous disregard for the constitutional rights of the Plaintiffs. As a result they believe Defendants Raymond, Westmoreland, English and the HISD are vicariously liable for the actions of Defendant Lacy.

The HISD is a local governmental body. *See Kingsville*

Independent School District v. Cooper, 611 F.2d 1109, 1112 (5th Cir. 1980). According to the United States Supreme Court "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature *caused* a constitutional tort. In particular . . . a municipality cannot be held liable *solely* because it employs a tortfeasor. . . ." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978). Furthermore, liability cannot be imposed upon a municipality pursuant to section 1983 on the basis of vicarious liability. *City of St. Louis v. Praprotnick*, __ U.S. __, 108 S.Ct. 915 (1988).

Therefore, the HISD can be liable only if Plaintiffs can establish the school district had an official policy or custom, promulgated by persons with final decision making authority, that was the moving force behind the constitutional deprivation. *Monell, supra; Palmer v. City of San Antonio*, 810 F.2d 514 (5th Cir. 1987). Official policy refers to "formal rules or understandings" that establish "fixed plans of action to be followed by a government entity." *Pembaur v. City of Cincinnati*, __ U.S. __, 106 S.Ct. 1292, 1294 (1986). Such policy is usually determined by the highest governing body such as the school board. *See Kingsville Independent School District, supra.* However, Plaintiffs contend it is Dr. Raymond as superintendent, who determines official policies. To support his belief they submit the affidavit of Philip Allen who has worked in the Texas school system in various capacities for twenty-nine years. He states that the Superintendent of HISD is responsible for determining school policy and bases this belief on his experiences in the Lumberton Independent School District. The Court finds this affidavit is not sufficient to establish that a genuine issue of fact exists. First of all, Allan's experiences in Lumberton do not make him an authority on the inner working of the HISD. Second, Defendant Raymond was not the Superintendent of the HISD when the policies regarding the

hiring and training of Defendant Lacy were implemented. This incident occurred after she had been on the job only three months.

Policy cannot be determined on the basis of a single act of a lower level employee. "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell* unless proof of the incident includes proof that it was caused by an existing unconstitutional municipal policy, which policy can be attributed to a municipal policy maker." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985). Therefore, Plaintiffs must not only show there was a policy but that there was an affirmative link between the policy and the deprivation of constitutional rights. *Id.*

Plaintiffs have failed to allege that their injuries occurred as the result of a policy or custom of the HISD as required by the Supreme Court. No evidence has been produced to show the HISD had actual or constructive knowledge of any pattern of sexual assaults by bus drivers prior to December 9, 1986. There is also no evidence of a pattern of misbehavior by Defendant Lacy. Defendants have submitted to the Court the affidavit of Cathy Mincberg who was the president of the HISD board at the time of the alleged incident. She states that the Board had received no complaints regarding Defendant Lacy or information that students were susceptible to sexual abuse while on HISD buses. Dr. Mincberg also explains the policies and procedures used, in the hiring and training of bus drivers.

The affidavit of Frank Wilson has also been submitted by Defendant. It describes the criminal background check that is done on all potential transportation employees. He states that nothing appeared in Defendant Lacy's background check that would place the HISD on notice that he would present a risk to children.

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Plaintiffs have submitted as an exhibit to their response a copy of Defendant Lacy's criminal history. The Court can find nothing in this document which indicates Defendant Lacy should not have been hired.

Plaintiffs also contend the HISD violated their constitutionally protected liberty interests in attending school free from bodily harm and that they had a property interest in the "right to seek a remedy." There is no constitutional right to be free from intentional torts committed by government employees acting outside the scope of their employment. *See Young v. City of Killean, Texas*, 775 F.2d 1349 (5th Cir. 1985). In addition, federal courts do not recognize a constitutional right to be free from bodily harm at school. *See DeShaney v. Winnebago*, __ U.S. __, 109 S.Ct. 998 (1989). Furthermore, Courts have rejected the argument that there is a constitutionally protected right to a safe environment. *Voorhies v. Conroe Independent School District*, 610 F. Supp. 868 (S.D. Tex. 1985).

State law determines what constitutes a protected property interest. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). An injured student does not have the right to seek a remedy from the school district under the open courts provision of the Texas Constitution or the federal constitution. *Stout v. Grand Prairie Independent School District*, 733 S.W.2d 290 (Tex. Civ. App.--Dallas, 1987, error ref'd n.r.e.), *cert. denied*, __ U.S. __, 108 S.Ct. 1082 (1988).

This is really a negligence suit. However, negligence does not constitute a deprivation within the meaning of the fourteenth amendment. *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986). Plaintiffs allege the HISD was negligent in hiring Defendant Lacy because he had a criminal history. However, their investigation revealed only one prior charge on which the Defendant had been acquitted.

Appendix D

For a municipality to be liable for negligent hiring Plaintiffs must establish the Defendant's conduct amounted to a conscious indifference to the welfare of the public, demonstrate there was actual knowledge of the seriously deficient character of an applicant, or show there was a widespread pattern of hiring employees with backgrounds of unjustified violence. *Wassum v. City of Bellaire, Texas*, 861 F.2d 453, 456 (5th Cir. 1988). Plaintiffs have failed to present this vital evidence. They have submitted only the one page criminal history report on Defendant Lacy and the affidavit of Plaintiff William Von Drehle. The criminal history report reveals nothing that would put the HISD on notice that Defendant Lacy could present a risk to young children. The Von Drehle affidavit states that substitute bus drivers are selected by the HISD's Transportation Department and complains that there is no communication link between the HISD and the buses while they are in route. A section 1983 claim cannot be established without more substantial evidence.

As stated previously, the HISD cannot be found liable pursuant to section 1983 for an isolated incident of employee misconduct. *Lopez v. Houston Independent School District*, 817 F.2d 351, 354 (5th Cir. 1987). According to the complaint, if any injury occurred it was inflicted by Defendant Lacy. No allegation has been made that officials of the HISD were aware of a pattern of sexual assaults on students by bus drivers or by Defendant Lacy in particular. Unfortunately, the HISD cannot investigate and determine the validity of reports of sexual abuse or take appropriate action until they are made aware of the situation. Based on the above, this Court finds the HISD is entitled to summary judgment.

For Defendants Raymond, Westmoreland, and English to be liable in their official capacities Plaintiffs must allege and prove

these Defendants participated in a custom, policy or practice which violated the Plaintiffs' clearly established constitutional rights and that they actively participated in the execution of a corrupt policy or custom. No specific acts or wrongdoings by these specific Defendants has been alleged. The record shows they were not personally involved in the employment or training of Defendant Lacy nor did they act in this matter until after the alleged incident occurred.

These Defendants have all submitted affidavits which substantiate their claims that they did not violate a clearly established constitutional right of the Plaintiffs. They also state that they could not have been aware of the alleged violation prior to December 1986. In response, Plaintiffs submit numerous newspaper articles dealing with child abuse and school violence. None of these are dated prior to December 1986 and therefore could not have put the HISD or its officials on notice of this potential problem. Accordingly, the Court finds these Defendants were not personally involved in any acts of misconduct and were not on notice of this possible violation. As a result, these Defendants are entitled to summary judgment in their official capacities.

School officials are not liable in their individual capacities unless they personally participate in the violation of a clearly established constitutional or statutory right of a person. *Davis v. Scherer,* 468 U.S. 183 (1984). In addition, supervisory personnel cannot be held liable under section 1983 for the acts of their subordinates. *Jett v. Dallas Independent School District,* __ U.S. __, 109 S.Ct. 2702 (1989). Nowhere in the complaint are specific allegations made concerning misdeeds by these Defendants which may have violated Plaintiffs' constitutional rights. Their uncontroverted affidavits verify they did not participate in any

wrongful activity. As a result Plaintiffs have failed to show these Defendants' actions were malicious or egregious as required for the imposition liability.

Defendants Raymond, Westmoreland and English also claim they are entitled to qualified immunity. To defeat this defense Plaintiffs must show these individuals (1) had notice of a pattern of unconstitutional acts; (2) demonstrated deliberate indifference to the offensive acts; (3) failed to take remedial action; and (4) this failure was the proximate cause of Plaintiffs' injuries. *Doe v. Special School District*, 682 F. Supp. 451 (E.D. Mo. 1988). Again, mere negligence in the supervision of subordinates is not enough, *id.*, and Plaintiffs have not come to satisfying this four part test. Plaintiffs evidence is either irrelevant or based on incidents occurring after 1986. Furthermore, the negligence allegations do not create a cause of action against these particular Defendants. Negligence simply does not reach the type of abusive conduct the Due Process Clause was designed to prevent, even when it results in serious injury. *Davidson, supra.* Conclusory allegations that Plaintiffs were owed a duty and that duty was breached will not establish individual liability in this situation.

Summary judgment is also proper in this case on the pendent state claims. Since school districts are state agencies, the district, as well as its employees, are immune from negligence suits. *Hopkins v. Spring Independent School District*, 736 S.W.2d 617 (Tex. 1987). In addition, the HISD is immune from suits alleging tortuous conduct by employees performing governmental functions unless expressly waived by the provisions of the Texas Tort Claims Act. *See City of Dallas v. Moreau*, 718 S.W.2d 776 (Tex. App. -- Corpus Christi 1986, writ ref'd n.r.e). There has been no waiver under the facts as alleged by the Plaintiffs. The Texas Tort Claims Act expressly provides that it does not apply to a claim arising out of assault, battery, false imprisonment, or any other

intentional tort." Tex. Civ. Prac. & Rem. Code Ann. § 101.057 (Vernon 1986). Finally, section 21.912 of the Texas Education Code states that professional employees of a school district are not liable for acts done within the scope of employment when such an act involves the exercise of discretion. The only exceptions are for the use of excessive force in discipline and for injuries resulting from the negligence operation of a motor vehicle. Therefore, section 21.912 immunity also applies. After a careful review of the relevant authority, the Court finds the HISD and Defendants Raymond, Westmoreland and English are immune from the pendent state claims.

Defendant Lacy, the bus driver, has filed a motion to dismiss based on Plaintiffs' failure to take his deposition or prosecute this case. Lacy also contends he is not required to prove his innocence in this matter. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that Plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957). When evaluating a motion to dismiss the Court must assume everything in Plaintiffs' complaint is true. *Schauer v. Rhodes*, 416 U.S. 232, 236 (1974). The Court believes Defendant Lacy has failed to satisfy the stringent *Conley* test. Therefore, it is

ORDERED that the motions for summary judgment filed by Defendants Raymond, Westmoreland, English and the HISD are GRANTED in their entirety and the claims against these Defendants are DISMISSED with prejudice. It is further

ORDERED that the motion for sanctions filed by Defendants Raymond, Westmoreland and English is DENIED. It is further

ORDERED that Defendant Lacy's motion to dismiss is DENIED. It is further

ORDERED that Plaintiffs' motion to amend is DENIED. It is further

ORDERED that counsel for the Plaintiffs and Defendant Lacy appear for docket call on January 8, 1990 at 9:30 a.m. at which time this case will be set for trial. A joint pretrial order is due on or before January 2, 1990.

IT IS SO ORDERED.

Signed this 21st day of November 1989 at Houston, Texas.

s/ Norman W. Black
NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED
JUL 14 1994
OFFICE OF THE CLERK

NO. 93-1918

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

EDDY LANKFORD,
Petitioner,

v.

JANE DOE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT JANE DOE IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a public school teacher who sexually molested one of his female pupils, including during school hours and on school premises, was acting under color of state law for purposes of establishing a violation of 42 U.S.C. §1983.

2. Whether a public school principal may be held liable under 42 U.S.C. §1983 where he acted with deliberate indifference to a teacher's violations of a schoolchild's due process right not to be sexually molested.

3. Whether it was clearly established in the Fifth Circuit in 1987 that a public schoolchild had a substantive due process right not to be sexually molested by her teacher and that a public school official, with supervisory authority over the teacher, could be held liable under 42 U.S.C. §1983 for his deliberate indifference to that right.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

NO. 93-1918

EDDY LANKFORD,
Petitioner,

v.

JANE DOE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT JANE DOE IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-105a) is reported at 15 F.3d 443. The decision of the district

court (Pet. App. 108a-131a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1994. The petition for a writ of certiorari was filed on June 1, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

1. Respondent Jane Doe brought this suit in the United States District Court for the Western District of Texas against Taylor Independent School District, her ninth-grade biology teacher Lynn Stroud, school superintendent Mike Caplinger and principal Eddy Lankford (petitioner herein), alleging violations of, *inter alia*, 42 U.S.C. §1983 and Title IX of the Education Amendments of 1972, 20 U.S.C. §1681. With respect to her Section 1983 claims, respondent alleged that Stroud had repeatedly sexually abused and harassed her in violation of rights guaranteed to her by the due process and equal protection clauses of the Fourteenth Amendment. She further alleged that petitioner and Superintendent Caplinger had actual or constructive knowledge of Stroud's misconduct and were deliberately indifferent to the violation of her rights.[1]

Petitioner received complaints from parents, teachers and students that Lynn Stroud, a teacher and coach at Taylor

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[1] The portion of the complaint quoted by petitioner (Pet. 5) omits paragraph 36 in which respondent alleged that petitioner "acted with deliberate and conscious indifference to [her] constitutional rights." Record on appeal, vol II, p. 584.

High School, engaged favoritism toward female students and inappropriate conduct of a sexual nature with female students. (Pet. App. 3a-5a). In May 1986, the school librarian reported to petitioner that she witnessed an incident of "child molestation" involving Stroud and two female students. (Pet. App. 5a). Petitioner made light of the incident and failed to warn or discipline Stroud or to document any of the complaints. (Pet. App. 5a-6a). In the fall of 1986, Stroud became respondent's ninth-grade biology teacher and "began his seduction of Doe by writing personal -- often suggestive -- comments on her homework and test papers." (Pet. App. 6a). Stroud began touching and kissing respondent, the first time with a kiss on her cheek as she was leaving the school field house. (*Ibid*). "Eventually, he began taking her into the laboratory room adjacent to the classroom and to the field house to engage in kissing and petting." (*Ibid*). He also called her out of other teachers' classrooms to engage in this behavior in the lab room. (Pet. App. 115a).

In early February 1987, petitioner learned that the assistant principal had seen Stroud acting inappropriately with some girls, including respondent, at a school basketball game. (Pet. App. 7a). About that time the school athletic director told petitioner that he spoke to Stroud about his suspicion that Stroud was "fooling around" with the "little old girls." Petitioner did not ask the athletic director what the basis of his suspicion was. (*Ibid*).

Around Valentine's Day 1987, Stroud gave respondent a valentine in class on which he wrote, "'To my most favorite, prettiest, sweetest, nicest sweetheart in the world! Please don't change cause I need you. I'm in love with you. Forever - for real - I love you.'" (Pet. App. 7a-8a).

Respondent's classmate, Brittani B., who had found the valentine, took it to petitioner who indicated that he was aware of rumors about Stroud and respondent and said "that Stroud merely had a way of flirting with the girls." (Pet. App. 8a). Petitioner's only action was to transfer Brittani out of Stroud's class. He did not investigate further or record this or any other incident involving Stroud. (*Ibid*).

Stroud eventually persuaded respondent to have sexual intercourse with him in March or April of 1987. (Pet. App. 8a). In the next several months, they had repeated sexual contact "at different locations, both on and off the school grounds." (Pet. App. 9a). In June 1987, petitioner was informed that two parents had complained to the school superintendent, Caplinger, about improper behavior between Stroud and respondent at a local fair. (*Ibid*).

In July 1987, respondent's parents informed Superintendent Caplinger that they had found photographs of Stroud with handwritten notes on the backs similar to those on the valentine. (Pet. App. 10a). Petitioner met with Stroud, who denied having a sexual relationship with respondent. For the first time, petitioner spoke of disciplinary measures, suggested to Stroud that he resign and subsequently told Stroud that he "would be fired 'if something was going on.'" (Pet. App. 11a). However, petitioner took no further action.

Although respondent was able to stay away from Stroud during the remainder of the summer, after school started petitioner "watched Stroud no more closely than he previously had," and Stroud resumed having sexual intercourse with respondent. (Pet. App. 11a). In October 1987, respondent's mother found more letters from Stroud and consulted with their family lawyer, to whom respondent

disclosed what had happened between her and Stroud. The attorney reported the abuse to Superintendent Caplinger, who on the same day received a complaint that Stroud had made unwelcome sexual advances toward another schoolgirl. Stroud was suspended and later pled guilty to criminal charges. (Pet. App. 11a-12a).

2. In a lengthy opinion, the district court denied the motions of petitioner and Superintendent Caplinger for summary judgment on their defense of qualified immunity. The district court held that the sexual molestation respondent suffered violated her clearly established constitutional right to be free from bodily harm and sexual harassment at school. Finding material factual issues in dispute, the district court held that while petitioner and the superintendent may not have had a duty to protect respondent, "they certainly had a duty to respond to the parents, teachers, students and fellow administrators' blatant protests against the offender's conduct." (Pet. App. 130a). The district court concluded that the evidence raised a reasonable question of fact as to whether the school officials "tolerate[d] Stroud's abuse to the point that they actually condoned the abuse. . . ." *Ibid.*

3. On interlocutory appeal a panel of the Fifth Circuit affirmed the denial of summary judgment on qualified immunity grounds and remanded the case for trial. 975 F.2d 137. The panel held that respondent "had a firmly established constitutional right under the due process and equal protection clauses of the Fourteenth Amendment to be free from sexual molestation by a state-employed schoolteacher. . . ." 975 F.2d at 138. The panel further held that both Superintendent Caplinger and Principal Lankford could be found liable based on the evidence of their deliberate indifference to a known pattern of misconduct by Stroud.

975 F.2d at 147-48.

4. This Court declined to review the panel opinion. *Caplinger and Lankford v. Doe*, __ U.S. __, 113 S.Ct. 1066 (1993). After Lankford and Caplinger's petition for a writ of certiorari was denied, the Fifth Circuit *sua sponte* ordered that the case be reheard *en banc*.

5. The court of appeals, sitting *en banc*, reversed the denial of immunity to superintendent Caplinger, but affirmed as to principal Lankford in an opinion authored by Judges Jolly and Davis in which six other judges joined. The court of appeals held that "schoolchildren do have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment and that physical sexual abuse by a school employee violates that right." (Pet. App. 2a). In a footnote, the court of appeals rejected the argument that Stroud had not been acting under color of state law, noting that "Stroud took full advantage of his position as Doe's teacher and coach to seduce her." (Pet. App. 17a n.4). The court of appeals further held that "school officials can be held liable for supervisory failures that result in the molestation of a schoolchild if those failures manifest a deliberate indifference to the constitutional rights of that child" and that these legal principles were clearly established in 1987. (Pet. App. 2a). The court adopted a three-part test, determining that school officials may be held liable in sexual abuse cases if the plaintiff establishes that:

> (1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subor-

dinate was sexually abusing the student; and

(2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and

(3) such failure caused a constitutional injury to the student.

(Pet. App. 23a). The court of appeals concluded that there was sufficient evidence under this standard to defeat petitioner's motion for summary judgment on his defense of qualified immunity, but that summary judgment should have been granted to Superintendent Caplinger.

Judge Higginbotham (joined by Judge Politz) wrote a separate concurring opinion, and six Judges dissented, with dissenting opinions authored by Judges Garwood and Jones, both of which were joined by all dissenters, and by Judge Garza.

ARGUMENT

The legal issues presented in this case are no different now than they were when this Court denied petitioner's first petition for a writ of certiorari, which was filed after the panel opinion. No intervening precedent has established a conflict in the circuits. Indeed, every court of appeals that has reviewed a case of sexual molestation of a schoolchild by a teacher or other public employee has agreed with the court of appeals (and the original panel) in this case that such abuse violates the child's Fourteenth Amendment

rights and that under 42 U.S.C. §1983 school officials can be held liable for their deliberate indifference to such abuse. *See Gates v. Unified School District No. 449*, 996 F.2d 1035, 1041 (10th Cir. 1993); *Jane Doe "A" v. Special School District of St. Louis County*, 901 F.2d 642, 645 (8th Cir. 1990); *Stoneking v. Bradford Area School District*, 882 F.2d 720, 725-27 (3d Cir. 1988), *cert. denied*, 493 U.S. 1044 (1990) (*Stoneking II*). *See also D.T. by M.T. v. Independent School District No. 16*, 894 F.2d 1176, 1187 (10th Cir. 1990), *cert. denied*, 498 U.S. 1044 (1990). *Cf. J.O. v. Alton Community Unit School District 11*, 909 F.2d 267, 272-73 & n.4 (7th Cir. 1990). The courts of appeals' unanimous view of the law is correct and there is thus no reason for this Court to grant petitioner's second petition for a writ of certiorari.

To be sure, in applying these legal principles, the courts of appeals came to varying conclusions about whether the public school officials before them should have been granted qualified immunity under the particular facts of each case. Similarly, the court of appeals in this case after very carefully reviewing the facts concluded that there was sufficient evidence to present the issue of petitioner's qualified immunity to a jury, but that Superintendent Caplinger was entitled to summary judgment. As will be shown below, most of petitioner's arguments essentially challenge the court of appeals' factual determination that there is sufficient evidence in this case, when viewed in the light most favorable to respondent, from which a jury could find that petitioner is liable under 42 U.S.C. §1983. In so arguing, petitioner inappropriately resolves factual disputes in his favor, and in any event, such factual issues do not warrant review by this Court, particularly on interlocutory

appeal at the summary judgment stage.

1. Petitioner first argues that Coach Stroud's sexual abuse of respondent "which occurred outside of school hours or any school related activity" (Pet. 10) was not under color of state law.[2] Contrary to petitioner's allegations, however, Stroud sexually molested respondent during school hours over a period of several months when he "took Doe from his classroom to an adjoining lab room where he kissed and petted her." (Pet. App. 17a n.4). Indeed, Stroud harassed, molested and abused respondent in connection with school activities and on school property on untold occasions over the course of almost a year. *See* Pet. App. 6a-7a, 9a, 17a n.4.

Thus, this case is not in conflict with *D.T. by M.T. v. Independent School District No. 16* because, as the court of appeals recognized (Pet. App. 17a n.4), the facts of this case are radically different from those in *D.T. by M.T.*. In that case, the Tenth Circuit found that a teacher had not acted under color of state law when he abused children during the summer on a private fund-raising trip unrelated to the school and when he had no contractual obligations to the district. 894 F.2d at 1182-83, 1187-88. In this case respondent was victimized during the school year and at times even during class hours and on campus, thus creating the nexus to state action that was lacking in *D.T. by M.T.*. Moreover, there is

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[2] Petitioner argues that Stroud must have been acting under color of state law in order for respondent to state a violation of 42 U.S.C. §1983. However, it is undisputed that petitioner was acting under color of state law, and that is all that is necessary to hold him liable for his deliberate indifference and tacit condonation of Stroud's sexual harassment and sexual abuse of students on school property, during school hours and in connection with school events. *See Black by Black v. Indiana Area School District*, 985 F.2d 707, 711 (3d Cir. 1993).

no conflict in the legal standards applied by the Tenth Circuit and the court of appeals in this case: both courts used a similar legal analysis for determining whether a teacher acted under color of state law, but the courts came to different conclusions based on the particular facts of each case.

Petitioner contends that Coach Stroud was not acting under color of state law because he was not authorized to sexually molest his students. If this argument were accepted, students who are sexually abused by a teacher in connection with school attendance could rarely, if ever, make a claim under 42 U.S.C. §1983, because it is unlikely that such misconduct will ever be authorized by the state. Moreover, as Judge Higginbotham pointed out (Pet. App. 41a), this Court put such arguments to rest in *Monroe v. Pape*, 365 U.S. 167 (1961), where police officers broke into a home in violation of state law and the state constitution. The Court rejected the argument that the "under color of state law" requirement of Section 1983 was not met because the acts were unauthorized and because state law provided a remedy. The Court held that Congress "meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." 365 U.S. at 172. In this case Stroud abused his position by sexually molesting respondent during the course of carrying out his official duties and by "us[ing] his position of authority to pressure and manipulate Doe into sex . . . ." (Pet. App. 36a (J. Higginbotham, concurring)).[3] The court of appeals'

[3] Relying on Judge Garza's lone dissent, petitioner seems to argue that if a state official exceeds his authority in areas where he has some authorization a Section 1983 claim can be made out, but no claim will lie if the official has no authorization whatsoever. Thus, petitioner argues, Stroud had no authority to sexually molest respondent, therefore he did

holding that Stroud acted under color of state law is correct and in accord with the decisions of this Court and other courts of appeals. *See Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 480 (9th Cir. 1991)(a state employee who was responsible for finding employment for refugees was acting under color of state law when he raped refugee women at, among other places, motels to which he took them); *see also Stoneking II*, 882 F.2d at 722, 726-27 (band director's sexual molestation of a student violated her clearly established constitutional rights although some of the acts of abuse occurred in his car or in his house).

2. a) The deliberate indifference standard endorsed by the court of appeals is consistent in all significant respects with the standards articulated by the other courts of appeals to have addressed the issue of when a school official can be held liable for a subordinate's acts of sexual abuse. *See Jane Doe "A" v. Special School District of St. Louis County*, 901 F.2d at 645 (personal liability is established where the school official "1) Received notice of a pattern of unconstitutional acts committed by subordinates; 2) Demonstrated deliberate indifference to or tacit authorization of the offensive acts; 3)

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not abuse his authority and could not be said to have acted under color of state law for Section 1983 purposes. As Judge Higginbotham pointed out, this analysis conflicts with *United States v. Price*, 383 U.S. 787 (1966), where law enforcement officers, among others, were found to have acted under color of state law when they conspired to murder civil rights workers, an act clearly outside their authority. Furthermore, Judge Garza's approach depends solely on how actions are characterized and they can often be characterized either as unauthorized or as exceeding granted authority. For example, one can say that Stroud had authority to take respondent into the lab room and perhaps even to touch her in the course of guiding her in a biology experiment. He, therefore, abused his authority when he took her into the lab room for a sexual encounter and touched her there in sexual ways, just as the officials in *Price* abused their authority when they plotted to kill the civil rights workers.

Failed to take sufficient remedial action; and 4) . . . such failure proximately caused injury to the children"); *Gates v. Unified School District No. 449*, 996 F.2d at 1041 (same); *Stoneking II*, 882 F.2d at 725 (school officials may be held liable based on "policies maintained in deliberate indifference to actions taken by subordinates"). *See also D.T. by M.T. v. Independent School District No. 16*, 894 F.2d at 1193 (court recognized that liability could be predicated on school officials' deliberate indifference to constitutional rights, but found insufficient evidence of deliberate indifference). *Cf. J.O. v. Alton Community Unit School District 11*, 909 F.2d at 272-73 & n.4 (suggesting that the court would find liability where school officials promulgated policies that fostered child abuse). All these courts recognize that a deliberate failure to act to prevent sexual abuse can result in liability.

Nevertheless, petitioner quibbles with the deliberate indifference standard as applied in this case because, he argues, it contains no element of affirmative conduct. However, a deliberate refusal to act, where a supervisor has an obligation to act and where his actions could prevent injury, constitutes conduct. A supervisor in such a situation should not be able to escape liability merely on the ground that he shirked his responsibility and did nothing. As Judge Higginbotham explained, an "egregious failure [by petitioner] to fulfill [his] obligation to oversee Stroud's behavior would amount to action on [his] part." (Pet. App. 45a). An egregious failure to act after notice of improprieties also amounts to tacit authorization and condonation of that misconduct.

Moreover, petitioner again improperly resolves factual disputes in his favor when he argues that this case involves mere "inaction" and no "'communication of condonation or

authorization.'" (Pet. 15-16). To the contrary, petitioner took action which showed that he condoned Stroud's behavior. For example, in response to Brittani B.'s complaint about Stroud's valentine, petitioner took action -- he transferred Brittani out of Stroud's class thereby sending the clear signal that those who raised the issue of inappropriate behavior would suffer consequences. Petitioner also took action when he responded in a flippant and derisive manner to Brittani B., the librarian and others who brought Stroud's inappropriate behavior to his attention. Thus, contrary to petitioner's contentions, this case is very much like *Stoneking II* and the other cases he cites (Pet. 17) in which a supervisor demonstrates tacit condonation of the offensive conduct. *See, e.g., Stoneking II*, 882 F. 2d at 730-31 (principal and assistant principal who "discouraged and minimized reports of sexual misconduct by teachers" were not entitled to summary judgment because a jury could find that "such discouragement amounted to a communication of condonation of the teacher's behavior").[4]

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[4] In *Rizzo v. Goode*, 423 U.S. 362 (1976), on which petitioner relies, the Court held that a district court could not impose on a city police department a comprehensive program for handling citizen complaints of police misconduct solely because police officials had not themselves responded to statistics showing a pattern of police violations of rights. That case is factually different from this case, and among other things the decision turned on the fact that the defendant officials were not "causally linked" to the violations. 423 U.S. at 606. The standard adopted by the court of appeals in this case requires that causation be established before a school official can be held liable for injuries caused by a subordinate's misconduct. (Pet. App. 23a). After reviewing the summary judgment evidence, the court correctly ruled that there was sufficient evidence of causation here to present the issue to the jury. Not only were there affirmative action and statements which indicated that petitioner condoned Stroud's inappropriate conduct with young girls, but "[a] jury could reasonably conclude that had Lankford taken actions that were obviously necessary in response to the valentine --

b) Contrary to petitioner's contention, the notice requirement articulated by the court of appeals in this case is also like that adopted by other courts of appeals. Under the Fifth Circuit's standard, to hold a supervisory school official liable for the acts of a subordinate the defendant must have *"learned of facts or a pattern of inappropriate sexual behavior by a subordinate* pointing plainly to the conclusion that the subordinate was sexually abusing the student." (Pet. App. 23a, emphasis added). Other courts have simply required "notice of a pattern of unconstitutional acts committed by a subordinate . . . ." *Jane Doe A v. Special School District*, 901 F.2d at 645. *See also Stoneking II*, 882 F.2d at 724-25 (alleged "reckless indifference to instances of known *or suspected* sexual abuse of students by teachers" (emphasis added)). The notice to petitioner in this case -- including a very suggestive handwritten valentine, suspicions by the athletic director that Stroud was "fooling around" with the girls and a complaint of "child molestation" by the librarian -- clearly satisfies the Eighth Circuit's notice requirement. Correspondingly, the complaints in *Jane Doe A* that the bus driver used profanity and also kissed a small child on the bus do not necessarily point plainly to sexual abuse so as to satisfy the Fifth Circuit's standard. Accordingly, contrary to petitioner's argument, the results in this case and in the *Jane Doe A* case would be the same regardless of which articulation of the notice requirement is used. The inconsequential variations in the wording used by the Eighth and the Fifth Circuits do not require this Court's review, particularly since the evidence of notice in this case

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indeed, if he had responded at all -- the relationship might have been derailed at that point and the violation of Jane Doe's rights would not have been as severe or prolonged." (Pet. App. 29a).

would be sufficient to overcome summary judgment under either court's wording of the notice requirement.

3. The court of appeals decision that the legal principles it recognized were clearly established in 1987 also does not require review. It is consistent with other appellate decisions, most notably *Stoneking II*, in which the Third Circuit denied qualified immunity to a principal and assistant principal at the summary judgment stage, holding that a student's right to be free from sexual abuse was clearly established even before 1977 and that reasonable officials would have understood this. 882 F.2d at 727. Furthermore, in *Jefferson v. Ysleta Independent School District*, 817 F.2d 303, 305 (5th Cir. 1987), the Fifth Circuit had previously held that a principal was not entitled to dismissal on qualified immunity grounds in a case involving injury to a student by a teacher because it had been clearly established in 1985, when the acts at issue there took place, that the due process clause protects a school child from unjustified bodily injury by a teacher. This same legal principle is applicable in this case.

As Judge Higginbotham cogently explained:

> This is a case about power and its abuse. The state conferred the power and Stroud abused it. That Coach Stroud exceeded the constitutional limits of his authority, and that Principal Lankford caused a violation of Doe's rights by looking away, are truths too plain to admit of uncertainty, legal or otherwise. We have never understood the Fourteenth Amendment to permit such a misuse of power."

(Pet. App. 34a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 93-1918

In the
Supreme Court of the United States

October Term, 1993

Eddy Lankford,
Petitioner,

v.

Jane Doe,
Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE FIFTH CIRCUIT COURT OF APPEALS

BRIEF *AMICI CURIAE* OF TEXAS ASSOCIATION OF SCHOOL BOARDS, TEXAS ASSOCIATION OF SCHOOL ADMINISTRATORS, TEXAS COUNCIL OF SCHOOL ATTORNEYS AND THE MISSISSIPPI SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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No. 93-1918

In the
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Eddy Lankford,

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BRIEF *AMICI CURIAE* OF TEXAS ASSOCIATION OF SCHOOL BOARDS, TEXAS ASSOCIATION OF SCHOOL ADMINISTRATORS, TEXAS COUNCIL OF SCHOOL ATTORNEYS, AND THE MISSISSIPPI SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*[1]

INTEREST OF *AMICI*

Amicus Curiae, the Texas Association of School Boards ("TASB"), is a nonprofit unincorporated association of the public school districts of the State of Texas. All of the 1052 public school districts in the State, through their elected boards of

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[1]Consent of the parties is on file with the clerk of this Court.

trustees, have joined as members of TASB. Under state law, the board of trustees of a school district has "the exclusive power to manage and govern the public free schools of the district." Tex. Educ. Code Ann. § 23.26(b)(West 1987). The members of TASB thus are responsible for the management and governance of the public schools of Texas, consistent with state and federal law.

Amicus Curiae, the Texas Association of School Administrators ("TASA"), represents the state's school superintendents and other school administrators who are responsible for carrying out the educational policies adopted by their local boards of trustees.

Amicus Curiae, the Texas Council of School Attorneys (the "Council"), is composed of attorneys who represent more than 90% of the public school districts of Texas.

Amicus Curiae, the Mississippi School Boards Association ("MSBA"), is a nonprofit

corporation of the public school districts of the State of Mississippi. All 149 public school districts in Mississippi, through their appointed or elected school boards, are members of MSBA. The members of MSBA are responsible for management and governance of the public schools in Mississippi, consistent with state and federal law.

STATEMENT OF THE CASE

Amici incorporate by reference thereto the statement of the case contained in brief of Petitioner.

REASONS FOR GRANTING THE WRIT

The implications of the lower court's decision will have substantial and detrimental effects upon our nation's public school system, a system that is already experiencing widespread and intensifying problems. The court below interpreted "under color of law" to encompass all actions taken by a governmental employee, even those exclusive to his or her private

made the insurer of student well-being under strained interpretations of civil rights law.

STATEMENT OF THE CASE

Amici incorporate by reference thereto the statement of the case contained in brief of Petitioners.

REASONS FOR GRANTING THE WRIT

For school districts the implications of the decision in this case are vast. The same analysis used by the lower court in the case at bar is being followed by numerous other courts to hold school districts and school supervisory officials liable under Section 1983 for their alleged negligence in supervising teachers and other personnel. The cases invoke the same theory to hold school districts and supervisory personnel liable for injuries to students whether the actions allegedly causing the injuries were committed by employees or by other students, and whether or not the injuries occurred off campus or on campus and even impose liability for actions

which, if true as alleged, were nothing more than negligent.

ARGUMENT

I. Introduction

Amici are, of course, deeply disturbed about the despicable conduct of the teacher/coach in this case. *Amici* and school boards and principals across the country are working diligently to develop mechanisms to prevent this kind of conduct and to prevent even the appearance of inappropriate behavior by school employees. For example, *Amicus* NSBA currently sits on an advisory board to the American Bar Association's Center on Children and the Law in its project, funded by the U.S. Department of Justice, to develop mechanisms to screen employees who deal with children, including children in private and public schools. NSBA also has a number of resolutions on this issue, developed by its Delegate Assembly composed of school board

members from every state in the Union. One of these reads as follows:

> NSBA urges state legislatures and agencies to assist school districts in developing methods for preventing, detecting and reporting child abuse. State laws that require reporting of suspected child abuse should also grant immunity for liability for reports made in good faith. School boards should develop policies on this subject that protect both the students and the due process rights of any involved employees. They should also institute in-service training programs for employees and education programs for students.

In addition, NSBA's Council of School Attorneys has recently published a monograph entitled *Child Abuse: Legal Issues for Schools*. A copy of the publication is lodged with the Clerk.

The lower court's zeal to compensate Respondent for her devastating injury is understandable, but the Fourteenth Amendment and Section 1983 were not designed to protect the citizenry from all manner of wrongs, even if perpetrated by a public employee. The

lower court erred in concluding that the U.S. Constitution guarantees students a substantive right to be free from tortious conduct committed by school district employees. Furthermore, even if the lower court were correct in the holding on the constitutional issue, the mechanism of attributing responsibility for the injuries in this case is not in accord with Supreme Court precedent. The "deliberate indifference" standard should be applied only in the criminal context.

I. New constitutional rights should be established by this Court and not by courts of appeals. This Court's continued silence on the issue of whether students have a substantive due process right to bodily integrity in the schools, is being misconstrued by lower courts to allow conversion of state tort actions into Fourteenth amendment cases.

A. Although this Court has never held that students have a substantive due process right to bodily integrity, the Fifth Circuit in the instant case holds that the right is "clearly established."

1. The Fifth Circuit's determination of a new constitutional right does not coincide with this Court's

historically sparing use of substantive due process analysis to protect interests in the penumbra of explicit rights and which have been deprived by the state through statute or an ongoing official practice.

The concept of "substantive due process" encompasses fundamental rights expressly enumerated in the Constitution, *e.g.*, the First Amendment rights of free speech and assembly and free exercise of religion, and interests in the penumbra of enumerated rights, such as the right of privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraceptives) interpreted to be in the penumbra of the right of free association; and to overturn state statutes which implicate liberty interests and are arbitrary and without reasonable basis, *e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (involving the liberty interest in educating one's children in the school of one's choosing); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)

(involving the right to study a foreign language). All of these cases involved state statutes.

This Court has been reluctant to find substantive due process implications in cases which do not involve statutes. In *Wood v. Strickland*, 420 U.S. 315 (1975), the Supreme Court vacated the judgment of the court of appeals which found a substantive due process violation in a school board's alleged misinterpretation of its rule against the possession of alcoholic beverages on school grounds. This Court stated that "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." 420 U.S. at 326.

In 1982, in a *per curiam* opinion, this Court reversed another attempt by the same court of appeals, through the use of substantive due process, to substitute its own judgment for that of the school board. *Board*

of Education of Rogers, Ark. v. McCluskey, 458 U.S. 966 (1982).

A medical student argued in the case of *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), that he had a property interest in a medical school program which gave rise to a substantive due process right to continued enrollment free from arbitrary state action. The Court ruled that the decision to dismiss the student was not arbitrary even if it were assumed that he had a substantive due process right. In a concurring opinion, Justice Powell stated that the Court's assumption on substantive due process was unnecessary.

> While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution . . . substantive due process rights are created only by the Constitution . . . The history of substantive due process "counsels caution and restraint." *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) . . . "Each new claim to [substantive due process] protection must be considered against a

> background of Constitutional purposes, as they have been rationally perceived and historically developed." [Citing *Poe v. Ullman*, 367 U.S. 497, 544 (1961)].

474 U.S. at 229.

2. The Fifth Circuit's decision and other lower court holdings on this issue exceed the limits established by this Court's decisions holding government officials responsible for bodily injuries to individuals only in situations where the state has *affirmatively* restrained the individual either in prison or through involuntary commitment to an institution.

The Fifth Circuit's ruling in this case has no basis in any ruling of the U.S. Supreme Court. All but one of this Court's decisions holding public officials liable for personal injuries to individuals are criminal cases, based either on the Eighth Amendment's proscription against cruel and unusual punishment or on the duty to provide medical care to detained individuals. The exception is *Youngberg v. Romeo*, 457 U.S. 307 (1982),

which upheld state liability for care of an individual who was involuntarily committed to a mental institution. The Court held that the State has a duty to ensure the individual's safety and to facilitate his ability to function free from bodily restraints. The Court equated involuntary commitment of mental patients with incarceration of prisoners, stating that "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed --- who may not be punished at all -- in unsafe conditions." 457 U.S. at 315-16. The Court, however, vacated the lower court decision because the jury was improperly instructed on the assumption that the proper standard of liability was that of the Eighth Amendment.

The operative word in the above quote, of course, is "confine." It is difficult to understand how students, particularly at the high school level, can be said to be

"confined" when they go home after school every day, go out to lunch at noon and have ready access to the principal and other administrators and teachers. Furthermore, most of the acts of the perpetrator in this case occurred outside the school.

Unfortunately, it appears that the lower court's holding, and the holding of a number of other lower courts as well, is based less on a finding that students are "confined" in the same manner as prisoners than on a belief that the actions of a school employee in abusing a child are worse than the action of a jailer in abusing a prisoner and, therefore, students should receive at least the same protections as a prisoner. But it is not the actions of the perpetrator that courts should look to in determining the existence of a substantive due process right, it is the action of the state in placing the student in the school. Did the state's action place the student in a dangerous environment from which

she cannot extricate herself? In this case, the answer to that question has to be in the negative.

In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), this Court emphasized that without *affirmative* state restraint on individual freedom there is no substantive due process violation. Using this approach, the Court refused to hold that a child has a substantive due process right to be protected by state welfare officials from intentional bodily injury inflicted by the child's father even where the officials knew the father was likely to inflict such injury. The Court held:

> The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. [Citations omitted.]. . . In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration,

> institutionalization, or other similar restraint of personal liberty -- which is the "deprivation of liberty" triggering the protection of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

489 U.S. at 200.

The court in this case distinguished *DeShaney* on the ground that the case involved a private wrongdoer. However, nothing in this Court's decisions indicates an intent to make that distinction.

The lower court decisions on this subject take one of two tracks, by holding either that there is a duty to protect arising from the "special relationship" created by compulsory attendance laws or that there is a substantive due process right to bodily integrity in the schools. The two court of appeals decisions in this case evidence the two theories.[1] Both

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[1] The panel decision in this case which was vacated by the court *en banc*, 975 F.2d 137 (5th Cir. 1992), held that there is a duty to protect students in the public

private actions cannot be the basis for liability against his employer, and thus furthers the purpose of Section 1983: To protect against government employees who exercise their power as government employees to deprive another of his constitutional rights. To the contrary, the Fifth Circuit has altered the effect of Section 1983 to be that of protecting citizens from deprivations of constitutional rights by a state actor under any circumstances.

b. If this teacher's acts were under color of state law, then virtually every act of a government employee will be characterized as being under color of state law.

The effect of the holding below is to include *all* acts, even those undertaken in purely private pursuits, within the purview of Section 1983. The link between the school and the constitutional violation is too illusory to encompass supervisory liability, and carried to its logical

conclusion, raises serious concerns about the extent of liability. The conduct at issue occurred in the teacher's private life, and the connection to the Taylor Independent School District was tenuous. As this Court has held, private actions cannot violate Due Process rights: "....[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 197. As proponents of the public school system, *Amici* would like to be able to protect schoolchildren to the fullest extent. In today's society, however, complete protection is simply not possible. Even if the public schools had infinite resources, they would not be able to protect students from every conceivable harm that might befall them. We do not wish to see a recurrence of the events described by Respondent, but neither can we support the

holding below, which carries a potential for a new and significant basis of liability for school administrators and other local government officials.

B. Our government is premised on a separation of powers, but *Doe v. Taylor* threatens this balance.

This Court has been particularly cognizant of the cooperative relationship between the federal government and the governments of the several States. As guardians of individuals' constitutional rights, the federal courts must occasionally interfere with a state's authority in order to ensure that protection. This exercise, however, is not an inconsequential one, and is only to be used when necessary. As Justice O'Connor observed: "[S]ection 1983 is not a 'federal good government act.'" *Canton*, 489 U.S.at 395 (concurring opinion). This traditional restraint from interference is another rationale for requiring a high degree of fault by supervisory government

officials before attaching constitutional liability--the high threshold limits the frequency with which a federal court would be compelled to intervene in state affairs. The court below, however, has encroached upon this boundary by lowering this threshold. After *Doe v. Taylor*, a supervisory official who had no actual knowledge of constitutional violations by subordinates could be liable under Section 1983, a federal law. This holding not only departs from precedential wisdom, but also allows federal courts to become increasingly involved in the affairs of the States. In fact, this concern has played a pivotal role in more than one decision of this Court. *See, e.g., Rizzo v. Goode; Mitchum v. Foster*, 407 U.S. 225 (1972) (explaining that Section 1983 allows federal courts to issue injunctions in state proceedings, and recognizing the importance of federal nonintervention). While *Amici* respect the

federal courts' role of protector of individual civil rights, we request this Court to consider whether the court below has given adequate consideration to the doctrine of judicial restraint.

II. The court below has declined to follow a substantial line of precedents, threatening the reliability of our legal system.

Our legal system was designed to be dynamic, able to adapt to changes in society and differing factual situations. Although flexibility is an important and desirable goal, it must be balanced with an additional and equally important factor: Certainty. Much of our law has been carved out of court cases in which judges attempt to follow the wisdom and analysis of their peers and predecessors. As this Court stated: "The doctrine of *stare decisis* advances two important values of a rational system of law: (i) the certainty of legal principles and (ii) the wisdom of the conservative vision that existing rules should be

presumed rational 'at any time a new thought seems appealing.'" *Monell*, 436 U.S. at 709, n. 6. As courts announce their interpretations of the law, persons adapt their behavior to conform to these holdings. Change in established precedent may sometimes be necessary, given evolving societal forces or factual novelties, but such change must be made cautiously and only when the need for change is so great that it outweighs the importance of certainty. Furthermore, as now Chief Justice Rehnquist has recognized, the judiciary must realize that many actors have relied upon these prior decisions and may be seriously affected by their alteration: "Only the most compelling circumstances can justify this Court's abandonment of such firmly established statutory precedents." *Monell*, 436 U.S. at 715 (Rehnquist, joined by C.J. Burger, dissenting). Precedents of this Court, including *Rizzo* and its progeny, have

held that supervisory public officials are not liable for constitutional violations in the absence of the supervisor's having engaged in some affirmative conduct. Lower courts have followed the wisdom of *Rizzo* for nearly twenty years. *See, e.g., Gates v. Unified Sch. Dist. No. 449,* 996 F.2d 1035 (10th Cir. 1993); *Stoneking v. Bradford Area School District,* 882 F.2d 720 (3rd Cir. 1989), *cert. denied, sub nom. Smith v. Stoneking,* 493 U.S. 1044 (1990). Although this Court is certainly free to modify or even completely transform the "affirmative act" requirement previously employed, *Amici* suggest that the Court not do so; the reliability of our legal system and the soundness of this approach, evidenced by the length of time this interpretation has endured, are too important to be cast aside. The rules of this Court are never produced hastily, and as Justice Douglas so aptly noted, "should be good for more than one day

only." *Screws*, 325 U.S. at 112. Public policy favors upholding and applying prior law. There are no extenuating circumstances here that would tip the balance in favor of altering a proven, rational form of analysis.

The echoes of judicial holdings reverberate not only in the minds of those who are directly affected, but they resound in other, indirectly affected areas. For example, insurers of public entities rely on settled precedent when planning insurance coverage. *Amici* can only imagine how insurance premiums will escalate once the potential for constitutional liability for *inactions* of supervisory government employees becomes apparent. It is simply one more fray in the already fragile rope that binds our governmental structure. The potential flood of litigation that will flow from decisions like *Doe v. Taylor* could have devastating and lasting effects.

III. Under the new standard in the Fifth Circuit, supervisors are unconditionally liable for the actions of their subordinates.

A. By imposing liability for failure to act, the Fifth Circuit essentially established a negligence standard for supervisors under Section 1983.

1. Negligence does not implicate the Fourteenth Amendment and should not be the basis for Section 1983 liability.

The Fifth Circuit's decision has lowered the Section 1983 standard to simple negligence, contrary to the holdings of other circuits and to precedents established by this Court. *See Daniels v. Williams*, 474 U.S. 327 (1986); *Gates; Jane Doe "A" v. Special Sch. Dist. of Saint Louis County*, 901 F.2d 642 (8th Cir. 1990). Furthermore, the holding sets an unrealistic standard for supervisory officials, requiring them to have a level of omniscience concerning the conduct of their subordinates that is simply impracticable, if not impossible. This unprecedented extension of liability under

section 1983 would allow plaintiffs to proceed under the Fifth Circuit's lower standard of fault to create in essence *de facto* strict liability for all supervisory officials.

Prior to the decision below, Section 1983 liability had been imposed primarily upon supervisory defendants who demonstrated deliberate indifference after receiving actual notice of constitutional violations. *Daniels; Gates; Woodward v. City of Worland*, 977 F. 2d 1392, 1399 (10th Cir.), *cert. denied*, 113 S.Ct. 3038 (1992). This prerequisite of notice prevented the standard from becoming one of mere negligence, a transformation which this Court has explicitly sought to preclude:

> To Justice Powell, mere negligence could not "wor[k] a deprivation in the *constitutional sense*." Not only does the word "deprive" in the Due Process Clause connote more than a negligent act, but we should not "open the federal courts to lawsuits where there has been no affirmative abuse of power."

Daniels, 474 U.S. at 330 (citing *Parratt v. Taylor*, 451 U.S. 527, 548-49 (1981)). This Court made clear that Section 1983 liability must be based upon a "deliberate" or "conscious" deprivation of constitutional rights. "Deliberate" implies some amount of scienter, higher than negligence, but lower than intent. In other words, the defendant must have been conscious of an excessive risk that violations may be occurring. *Farmer v. Brennan*, 62 U.S.L.W. 4446, 4448-49 (U.S. June 6, 1994); *Canton*, 489 U.S. at 390. Consequently, without notice of an excessive risk of *constitutional* violations, a defendant could not be liable for failure to prevent a subordinate from committing those violations. For example, although a high school principal knew that a female student was infatuated with a teacher and the teacher encouraged her, without evidence that the principal knew the student had been sexually assaulted or that she had been

otherwise deprived of any constitutional right, the principal was entitled to qualified immunity. *Gates*, 996 F.2d at 1042. Similarly, Petitioner in this proceeding had heard rumors about a student-teacher relationship, but there were no specific allegations of constitutional deprivations. Evidence also shows that Petitioner's superior questioned both Respondent and the coach, but both denied any sexual relationship, leaving Petitioner with no justification to believe that sexual assault or other sexual abuse had occurred. *Doe v. Taylor*, 15 F.3d at 449. As he was neither conscious of an excessive risk nor had actual notice of any constitutional violations, Petitioner would be relieved of liability under decisions of other circuits. *Gates; Jane Doe "A"*. The record here does not support a conclusion that Petitioner was aware of an excessive risk; therefore, he could not have been deliberately

indifferent. At most, Petitioner's conduct failed to measure up to that of a reasonable person--he may have acted with a lack of due care, but his conduct did not rise to the level necessary to warrant liability under Section 1983.

2. The requisite affirmative link between the supervisor's conduct and the subordinate's misconduct was disregarded by the court below.

This Court has interpreted Section 1983 to require an "affirmative link" between a supervisor's conduct and a subordinate's misconduct: "By our decision in *Rizzo v. Goode* we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability." *Monell*, 436 U.S. at 694, n. 58. A finding of causation is therefore crucial to a civil rights claim, yet such is fatally lacking in Respondent's allegations. Without

explanation, the Fifth Circuit concluded that, had Petitioner acted, he could have prevented or at least minimized the violation of Respondent's constitutional right to bodily integrity. *Doe v. Taylor*, 15 F. 3d at 457. This leap of logic, however, is somewhat precipitous; case law generally requires more evidence of causation: "...[A]ll of the circuits agree that, at a minimum, supervisory liability requires a cause in fact relationship between the supervisor's action or inaction and the plaintiff's constitutional deprivation." 1 Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983*, § 3.23, at 247 (3rd Ed. 1991). In the instant case, a contrary conclusion would be equally viable: Even if Petitioner had intervened, the constitutional violations could have occurred nonetheless. In light of both the student's and the coach's denials of any

misconduct, Petitioner certainly lacked sufficient evidence to terminate the employment of the coach. A reprimand would not necessarily have ended the relationship; the intensity of the relationship might have been unaffected by a school administrator's actions.

By neglecting to find an "affirmative link," *Doe v. Taylor* has created the possibility that lower courts will hold supervisors vicariously liable for all unconstitutional acts of their subordinates, regardless of the level of the supervisor's involvement or knowledge. Moreover, the *Doe v. Taylor* holding is contrary to the language of the statute and to the holdings of this Court. Other circuits have stopped short of basing liability on the failure of supervisory officials to act or investigate, and require a plaintiff to prove that a direct nexus exists between the constitutional violations and the

supervisor's condonation or authorization thereof. *D.T.*, 894 F.2d at 1187; *Stoneking*, 882 F.2d at 730. Ultimately, of course, causation is a question of fact, but *Amici* urge the Court to consider clarifying this issue before the lower courts encounter further confusion.

3. Congress has amended the Civil Rights Act but has refrained from adding liability for nonfeasance.

Since the inception of the Civil Rights Act, Congress has periodically amended its provisions to address situations that may not be specifically covered by the Act and to correct areas that have proven problematic. Although courts have declined to impose liability upon supervisors for nonfeasance under Section 1983, Congress has not responded, implying its approval. *Amici* urge this Court to allow the United States Congress to decide whether the standard in Section 1983 should be revised to include supervisory nonfeasance.

B. Imposing liability on someone who has neither committed an offense nor has any actual knowledge or notice of the constitutional violation sends an unclear message.

1. This holding establishes no clear standard of conduct for supervisory officials.

The amount of knowledge a supervisory official has concerning the activities of his or her employees is especially relevant to the standard for imposing supervisory liability under Section 1983. A supervisor simply cannot be concerned with tracking every action of every employee under his or her control. While a supervisor may have a general idea of subordinates' activities, he or she may have no means to discern that a subordinate is engaging in conduct that violates constitutional rights. Even if a supervisor has notice of *tortious* actions of a subordinate, notice of actual *constitutional* violations does not necessarily follow; this difference could be crucial to the outcome of a Section 1983

action. It would advance no public policy nor any purpose of Section 1983 to impose liability upon supervisors who have no knowledge of constitutional violations. Requiring a supervisor to intuit constitutional violations would transform the nature of Section 1983 liability into a standard approaching tort liability for negligence. Any determination of liability is a serious matter, but liability for a constitutional violation is, of course, a matter of great consequence, and one for which there should be a clear standard of conduct. Absent such guidance, government employees have no frame of reference from which to model their conduct. The court below, without much explanation, did not set forth any such standard. It arrived at the determination that Petitioner could have been deliberately indifferent. What are school administrators and other supervisory officials to learn from this decision? To

discipline or terminate all employees on the basis of apparently unsubstantiated rumors? Administrators are limited in their ability to discipline by the due process rights of employees. In the absence of concrete evidence, the recommended code of conduct required by *Doe v. Taylor* is unclear.

In the test articulated for supervisory liability, the court below lowered requirements used by other circuits to allow a finding of liability if a supervisor "learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student." *Doe v. Taylor*, 15 F.3d at 454. While the goal behind this standard is an admirable one--increased protection of civil rights--it does not provide sufficient guidance for supervisory school officials. It has the potential to subject a supervisor to strict liability, for if he or she fails

to glean that constitutional violations are occurring and a court later determines that the supervisor should have done so, the transgressions of the subordinate become those of the supervisor. Not only does this test incorporate a significant amount of subjectivity by depending upon the deductive capabilities of the supervisor, but it also conflicts with decisions of the Eighth and Tenth Circuit Courts. *Gates*, 996 F.2d 1035 (10th Cir. 1993); *Jane Doe "A"*, 901 F. 2d 642 (8th Cir. 1990). Furthermore, it contradicts this Court's refusal to insinuate *respondeat superior* into a Section 1983 action, as established in *Monell*.

This Court recently held that deliberate indifference entails a higher standard than negligence. The public official must be reckless to the extent of knowing of and disregarding an excessive risk to health or safety. *Farmer v. Brennan*, 62 U.S.L.W. at 4449. *Farmer* was

the first decision of this Court which paused to explain the meaning of the term "deliberate indifference." *Id.* at 4448. Although the Court clearly limited its holding to cases arising under the Eighth Amendment, *Amici* urge the Court to extend *Farmer's* subjective test for deliberate indifference to *all* cases involving individual liability. Not only will such a measure provide a reasonable and consistent standard for public officials, but it will also provide much-needed guidance to the lower courts that constantly struggle with this very concept. In *Farmer*, the Court carefully distinguished its test from the one announced in *Canton*. *Id.* at 4450. *Amici* agree with this distinction and believe that the *Canton* objective test should be retained for proceedings against governmental *entities*. For *individuals*, however, the *Farmer* test is a much more logical and reasonable choice. Some courts, including

the Fifth Circuit, have extended the *Canton* test to individual public officials. *Doe v. Taylor,* 15 F.3d at 453; *Sample v. Diecks,* 885 F. 2d 1099, 1117-18 (3rd Cir. 1989). This extension, however, does not withstand scrutiny: "Needless to say, moreover, considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official." *Farmer,* 62 U.S.L.W. at 4450. Extending the subjective test adopted by this Court in *Farmer* would only be beneficial to our constitutional jurisprudence. Henceforth, public officials would understand the legal standard under which their actions would be examined, and "deliberate indifference" would gain the same familiarity of meaning as "negligence" and "recklessness." Reliability, consistency, and clarity would be restored to Section 1983 litigation.

In the Eighth Circuit, liability may attach when a defendant has notice of a pattern of unconstitutional acts. Without actual notice, a supervisor could not be deliberately indifferent nor could he tacitly authorize a subordinate's violation of another's constitutional rights. *Jane Doe "A"*, 901 F.2d at 646. The Tenth Circuit has adopted a similar standard--its test requires that a supervisor receive notice "of a pattern of violations of female students' constitutional rights to be free of sexual abuse at the hands of the school district's employees." *Gates*, 996 F.2d at 1041. Thus, without evidence that a school supervisor had notice of sexual misconduct, there could be no personal liability. *Id.* at 1042. By contrast, in the Fifth Circuit a supervisory official can now be considered deliberately indifferent without *actual* notice. If rumors or hearsay establish in at least one court's opinion that the facts

"pointed plainly toward the conclusion" that constitutional rights were being violated by subordinates, then the unconstitutional conduct could be attributable to that supervisor. In so holding, the Fifth Circuit has diminished the threshold for a Section 1983 action to one that approaches simple negligence, contrary to precedents of this Court. *See, e.g., Daniels.* *Amici* urge this Court to consider whether *Doe v. Taylor* truly comports with this Court's interpretation of civil rights liability in similar situations.

2. Without notice of possible harm, it is impossible to prevent that harm.

A primary reason for imposing liability is to deter actors from committing wrongs. In the holding below, denying Petitioner immunity from liability would certainly punish him, but there is no attendant guidance to direct future conduct. The lesson to be learned from imposing liability

in this case is unclear, and would serve only one function--to punish a school administrator for something that he could not have foreseen and to impose an unrealistic responsibility on school administrators. Preventing constitutional violations is an important goal, but the ability to discern violations as insidious as sexual abuse is an inherently difficult, subjective process. If an administrator dutifully investigates and a student actually reveals that his or her constitutional rights have been violated, then an administrator has a basis upon which to act. But when the student denies violations, as did Respondent, then it is unreasonable to expect the supervisor of the wrongdoer to prevent the violations. Without warning, no one can prevent harm. It is unrealistic to suggest otherwise, and imposing such a legal duty furthers no rational public policy.

3. Hindsight is a luxury unavailable to supervisory school officials; liability for nonfeasance would be totally impracticable when there is insufficient notice.

Amici are concerned about the welfare and education of public school students. While we abhor the situation described by Respondent, we ask this Court to view the situation through Petitioner's perspective. After reviewing the facts in 1994, it might seem obvious that Respondent's rights were being violated in 1987. Petitioner, however, did not have the benefit of hindsight, nor was there adequate guidance concerning this issue. Even today, *Amici* question whether it would be realistic to expect a school administrator to exercise such control over his or her teachers that he or she would be aware of *constitutional* violations committed by teachers when they were not at school. School administrators have a multitude of duties, not the least of

which is overseeing the activities of, often, several hundred teachers, students, and other employees. On any given day, they may have to choose between spending time responding to weapons, drugs, or other discipline problems, assisting and evaluating teachers, providing instructional leadership, conferring with students and parents, or preventing violence on campus. The court below has created an additional duty that requires a supervisor to investigate not only bona fide complaints, but also to scrutinize the most superficial rumors. If no limits are placed upon the nature and scope of a supervisor's investigation, this duty could become absurd, resulting in an infinite number of needless and fruitless searches. Will our public schoolchildren benefit from defensive and self-protecting supervisory activities or will this decision merely divert resources and encourage persons to pursue

litigation? *Amici* suggest that a supervisor's liability for misconduct of subordinate employees be considered only when those employees are engaged in activities that are in the course and scope of their employment, are under the supervisor's control, and are known to the supervisor.

CONCLUSION

Finally, *Amici* remind the Court that every time a school administrator is found liable, our schools and thus our children are ultimately deprived of resources that could have been used for education. *Amici* do not wish to relieve administrators or public officials from *all* constitutional liability; to the contrary, we accept that such responsibility must be retained, so that meritorious cases do not go unaddressed and constitutional rights are preserved. In this case, however, we would suggest a review of the lower court's opinion. Given

the nature of our public school system and the importance of education in this country, we would hope that, in situations where administrators were unable to prevent constitutional violations, constitutional liability would not attach. Allowing the holding below to stand would obviously permit more plaintiffs to recover for alleged constitutional violations, but only at the expense of too many others. The value of children's educational experience would be diminished because their school administrators would have to be primarily concerned with avoiding constitutional liability and forced to neglect pedagogical concerns. Under the current holding, liability of administrators is possible in so many situations that public funds will continuously be depleted at the expense of more teachers, better educational programs, and safer campuses.

For all the foregoing reasons, *Amici* urge this Court to grant the petition review this case.

Respectfully submitted,

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No. 93-1918

In the
Supreme Court of the United States
October Term, 1993

Eddy Lankford,
Petitioner,

v.

Jane Doe,
Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION AND NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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No. 93-1918

In the

Supreme Court of the United States

October Term, 1993

Eddy Lankford,
Petitioner,

v.

Jane Doe,
Respondent.

BRIEF *AMICI CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION AND NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

Counsel for both parties have consented to the filing of the within brief. Letters of consent are on file with the clerk.

INTEREST OF *AMICI*

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the

boards of education of the District of Columbia, the U.S. Virgin Islands, the Territory of Guam and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

The National Association of Secondary School Principals (NASSP) is a voluntary association of approximately 43,000 administrators of public and private schools throughout the United States. NASSP was organized in 1916 to aid in the improvement of educational programs for students enrolled in these schools and to provide a spokesman for secondary school administrators on matters of education policy. The organization sees the issues involved in the case at bar as of the utmost importance to its members and to the students in their charge.

The principles established by the lower court, if left standing, could significantly expand liability of local school boards and school officials for alleged negligence of school personnel in failing to protect students. Given the perceived "deep pockets" of school districts and their supervisory employees, plaintiffs will seek damages in federal courts under 42 U.S.C. § 1983, for injuries to students inflicted by the perpetrators, who are "judgment proof." *Amici* believe that it is critical to the efficient conduct of public education and maintenance of public confidence and support in public schools that school administrators be free to exercise their professional judgment on behalf of students and teachers alike without subjecting themselves and their boards to potential liability for the injury which a student may suffer as the result of the criminal acts of others. In short, neither the board nor its administrators should be

made the insurer of student well-being under strained interpretations of civil rights law.

STATEMENT OF THE CASE

Amici incorporate by reference thereto the statement of the case contained in brief of Petitioners.

REASONS FOR GRANTING THE WRIT

For school districts the implications of the decision in this case are vast. The same analysis used by the lower court in the case at bar is being followed by numerous other courts to hold school districts and school supervisory officials liable under Section 1983 for their alleged negligence in supervising teachers and other personnel. The cases invoke the same theory to hold school districts and supervisory personnel liable for injuries to students whether the actions allegedly causing the injuries were committed by employees or by other students, and whether or not the injuries occurred off campus or on campus and even impose liability for actions

which, if true as alleged, were nothing more than negligent.

ARGUMENT

I. Introduction

Amici are, of course, deeply disturbed about the despicable conduct of the teacher/coach in this case. *Amici* and school boards and principals across the country are working diligently to develop mechanisms to prevent this kind of conduct and to prevent even the appearance of inappropriate behavior by school employees. For example, *Amicus* NSBA currently sits on an advisory board to the American Bar Association's Center on Children and the Law in its project, funded by the U.S. Department of Justice, to develop mechanisms to screen employees who deal with children, including children in private and public schools. NSBA also has a number of resolutions on this issue, developed by its Delegate Assembly composed of school board

members from every state in the Union. One of these reads as follows:

> NSBA urges state legislatures and agencies to assist school districts in developing methods for preventing, detecting and reporting child abuse. State laws that require reporting of suspected child abuse should also grant immunity for liability for reports made in good faith. School boards should develop policies on this subject that protect both the students and the due process rights of any involved employees. They should also institute in-service training programs for employees and education programs for students.

In addition, NSBA's Council of School Attorneys has recently published a monograph entitled *Child Abuse: Legal Issues for Schools*. A copy of the publication is lodged with the Clerk.

The lower court's zeal to compensate Respondent for her devastating injury is understandable, but the Fourteenth Amendment and Section 1983 were not designed to protect the citizenry from all manner of wrongs, even if perpetrated by a public employee. The

lower court erred in concluding that the U.S. Constitution guarantees students a substantive right to be free from tortious conduct committed by school district employees. Furthermore, even if the lower court were correct in the holding on the constitutional issue, the mechanism of attributing responsibility for the injuries in this case is not in accord with Supreme Court precedent. The "deliberate indifference" standard should be applied only in the criminal context.

I. New constitutional rights should be established by this Court and not by courts of appeals. This Court's continued silence on the issue of whether students have a substantive due process right to bodily integrity in the schools, is being misconstrued by lower courts to allow conversion of state tort actions into Fourteenth amendment cases.

A. Although this Court has never held that students have a substantive due process right to bodily integrity, the Fifth Circuit in the instant case holds that the right is "clearly established."

1. The Fifth Circuit's determination of a new constitutional right does not coincide with this Court's

historically sparing use of substantive due process analysis to protect interests in the penumbra of explicit rights and which have been deprived by the state through statute or an ongoing official practice.

The concept of "substantive due process" encompasses fundamental rights expressly enumerated in the Constitution, *e.g.*, the First Amendment rights of free speech and assembly and free exercise of religion, and interests in the penumbra of enumerated rights, such as the right of privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraceptives) interpreted to be in the penumbra of the right of free association; and to overturn state statutes which implicate liberty interests and are arbitrary and without reasonable basis, *e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (involving the liberty interest in educating one's children in the school of one's choosing); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)

(involving the right to study a foreign language). All of these cases involved state statutes.

This Court has been reluctant to find substantive due process implications in cases which do not involve statutes. In *Wood v. Strickland*, 420 U.S. 315 (1975), the Supreme Court vacated the judgment of the court of appeals which found a substantive due process violation in a school board's alleged misinterpretation of its rule against the possession of alcoholic beverages on school grounds. This Court stated that "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." 420 U.S. at 326.

In 1982, in a *per curiam* opinion, this Court reversed another attempt by the same court of appeals, through the use of substantive due process, to substitute its own judgment for that of the school board. *Board*

of Education of Rogers, Ark. v. McCluskey, 458 U.S. 966 (1982).

A medical student argued in the case of *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), that he had a property interest in a medical school program which gave rise to a substantive due process right to continued enrollment free from arbitrary state action. The Court ruled that the decision to dismiss the student was not arbitrary even if it were assumed that he had a substantive due process right. In a concurring opinion, Justice Powell stated that the Court's assumption on substantive due process was unnecessary.

> While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution . . . substantive due process rights are created only by the Constitution . . . The history of substantive due process "counsels caution and restraint." *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) . . . "Each new claim to [substantive due process] protection must be considered against a

> background of Constitutional purposes, as they have been rationally perceived and historically developed." [Citing *Poe v. Ullman*, 367 U.S. 497, 544 (1961)].

474 U.S. at 229.

2. The Fifth Circuit's decision and other lower court holdings on this issue exceed the limits established by this Court's decisions holding government officials responsible for bodily injuries to individuals only in situations where the state has *affirmatively* restrained the individual either in prison or through involuntary commitment to an institution.

The Fifth Circuit's ruling in this case has no basis in any ruling of the U.S. Supreme Court. All but one of this Court's decisions holding public officials liable for personal injuries to individuals are criminal cases, based either on the Eighth Amendment's proscription against cruel and unusual punishment or on the duty to provide medical care to detained individuals. The exception is *Youngberg v. Romeo*, 457 U.S. 307 (1982),

which upheld state liability for care of an individual who was involuntarily committed to a mental institution. The Court held that the State has a duty to ensure the individual's safety and to facilitate his ability to function free from bodily restraints. The Court equated involuntary commitment of mental patients with incarceration of prisoners, stating that "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed --- who may not be punished at all -- in unsafe conditions." 457 U.S. at 315-16. The Court, however, vacated the lower court decision because the jury was improperly instructed on the assumption that the proper standard of liability was that of the Eighth Amendment.

The operative word in the above quote, of course, is "confine." It is difficult to understand how students, particularly at the high school level, can be said to be

"confined" when they go home after school every day, go out to lunch at noon and have ready access to the principal and other administrators and teachers. Furthermore, most of the acts of the perpetrator in this case occurred outside the school.

Unfortunately, it appears that the lower court's holding, and the holding of a number of other lower courts as well, is based less on a finding that students are "confined" in the same manner as prisoners than on a belief that the actions of a school employee in abusing a child are worse than the action of a jailer in abusing a prisoner and, therefore, students should receive at least the same protections as a prisoner. But it is not the actions of the perpetrator that courts should look to in determining the existence of a substantive due process right, it is the action of the state in placing the student in the school. Did the state's action place the student in a dangerous environment from which

she cannot extricate herself? In this case, the answer to that question has to be in the negative.

In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), this Court emphasized that without *affirmative* state restraint on individual freedom there is no substantive due process violation. Using this approach, the Court refused to hold that a child has a substantive due process right to be protected by state welfare officials from intentional bodily injury inflicted by the child's father even where the officials knew the father was likely to inflict such injury. The Court held:

> The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. [Citations omitted.]. . . In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration,

> institutionalization, or other similar restraint of personal liberty -- which is the "deprivation of liberty" triggering the protection of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

489 U.S. at 200.

The court in this case distinguished *DeShaney* on the ground that the case involved a private wrongdoer. However, nothing in this Court's decisions indicates an intent to make that distinction.

The lower court decisions on this subject take one of two tracks, by holding either that there is a duty to protect arising from the "special relationship" created by compulsory attendance laws or that there is a substantive due process right to bodily integrity in the schools. The two court of appeals decisions in this case evidence the two theories.[1] Both

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[1] The panel decision in this case which was vacated by the court *en banc*, 975 F.2d 137 (5th Cir. 1992), held that there is a duty to protect students in the public

theories are premised on misinterpretations of this Court's decisions.

For example, in the leading case on the subject of sexual abuse of students, *Stoneking v. Bradford Area School District (Stoneking I)*, 856 F.2d 594 (3rd Cir. 1988), *vacated* and *remanded*, 109 S.Ct. 1634 (1989), the Third Circuit held that female students in a public school have a constitutional right to be free from sexual abuse by a school employee and that the "special relationship" between the students and the school districts based on the state's compulsory attendance laws gives rise to a duty to investigate the allegations and to take steps to protect the students.[2]

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schools. The *en banc* decision held that there is a substantive due process right to bodily integrity in the schools to which the pleadings show the principal was "deliberately indifferent."

[2] This Court vacated and remanded that decision in light of *DeShaney*. On remand, the court reached the same conclusion but without using the "special relationship" analysis. (See discussion, *infra* at 22).

The *Stoneking I* decision derived from the erroneous view that this Court established a substantive right to be free from physical abuse in school in *Ingraham v. Wright*, 430 U.S. 651 (1977). That case raised the issue of whether excessive corporal punishment in the schools implicates the Eighth Amendment's proscription against cruel and unusual punishment. The Court held that, unlike prisoners, injured parties in the public schools have the power to resort to state remedies.

> The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.

430 U.S. at 670.

The Court agreed that students have a liberty interest in bodily integrity which is protected by procedural due process, but the Court explicitly stated that it was not ruling on the question of whether substantive due

process is implicated by excessive corporal punishment.

It should be noted that a much stronger case could be made for the proposition that corporal punishment implicates substantive due process, given the fact that the corporal punishment is officially sanctioned while the sexual abuse at issue here furthers the personal objectives of the perpetrator and violates specific school policies. Nevertheless, the "openness of the schools" argument should still prevail to differentiate students from prisoners and nothing in *Ingraham* supports the contention that student have a substantive right in their bodily integrity.

3. The Fifth Circuit's implicit reliance on *Rochin v. California* analysis which this Court has reserved for criminal cases is inappropriate for determining liability of school districts and school supervisors for the conduct of subordinates in pursuit of the latter's personal heinous objectives.

A number of lower court decisions[3] cite this Court's decision in *Rochin v. California*, 342 U.S. 165 (1952), for the proposition that "a state actor [cannot] use means which 'shock the conscience' in the name of the public good." These courts contend that *Rochin* supports the finding of a constitutional tort where a school employee's actions were so outrageous as to "shock the conscience" of the court. It is a tremendous leap from *Rochin* and the criminal cases following it to the case at bar where the employee's conduct furthers his personal interests and conflicts with the interests of the state. Shocking conduct of school employees does not *by itself* give rise to constitutional liability for that conduct.

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[3] The Fifth Circuit panel decision in this case cited *Rochin* directly and the full court supports its ruling with lower court cases that can be traced back to *Rochin*. Pet. App. A at 73a (Jones, C.J. dissenting).

There may be a fact situation where it would be appropriate to hold the school officials liable for conduct which "shocks the conscience," where the school "in the name of the public good," officially imposes punishment on children which is "too close to the rack and the screw to permit of constitutional differentiation." 342 U.S. at 172. But those facts are not before the Court in this case.

B. Even though this Court has never applied the "deliberate indifference" standard outside the criminal context, the Fifth Circuit and other lower courts are using that standard to hold school officials liable for bodily injuries to students.

The court of appeals held that plaintiff pled sufficient facts to demonstrate Lankford's "deliberate indifference" to the acts of the molesting employee. The "deliberate indifference" standard for holding supervisors liable for tortious acts of government employees was first announced by

this Court in *Estelle v. Gamble*, 429 U.S. 97 (1976). That case held that the state violates the Eighth Amendment's proscription against cruel and unusual punishment where it is "deliberately indifferent" to the "serious" medical needs of a prisoner.

In *City of Canton v. Harris*, 489 U.S. 381 (1989), the Court used the "deliberate indifference" standard in a somewhat different context where an individual was in custody but had not yet been convicted. In that case the Court held that a city could be held liable where its failure to train amounts to "deliberate indifference" to the due process right of detainee to receive medical attention. This Court has never, however, applied the "deliberate indifference" standard outside the criminal context nor in any context other than the right to medical attention.

Nevertheless, numerous lower court cases, including the case at bar, are applying that

standard to hold school districts liable for bodily injuries to students where the only official act of the school district is the mere introduction of the student to the offending party.

The leading school case in which the "deliberate indifference" standard was applied is the second *Stoneking* case, *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720 (3rd Cir. 1989), *cert. denied*, 110 S.Ct. 840 (1990). After this Court vacated and remanded *Stoneking I* in light of *DeShaney*, the Third Circuit Court of Appeals mused that it had the option of continuing to rest its decision on a duty to protect arising out of the "special relationship" created by the state's compulsory education laws. However, because of the "uncertainty of the law in this respect," the court instead ruled that the officials acted with "deliberate indifference" to the constitutional rights of the students through a custom that communicates condonation

of the behavior. The court again erroneously cited *Ingraham v. Wright* for the proposition that students have a substantive right to be free from sexual molestation.

Lower courts usually apply the "deliberate indifference" standard to hold school districts and supervisory employees liable in cases brought by students against their schools for damages under Section 1983 as the result of tortious conduct by school employees or other students. Even those cases which do not reach the question of whether there is a constitutional right to bodily integrity in the schools, apply the deliberate indifference standard in determining whether supervisory employees and the school district itself can be held liable under Section 1983 for assaults on students.

In *J.O. v. Alton Community Unit School Dist.*, 909 F.2d 267 (7th Cir. 1990), although holding that compulsory school attendance laws do not render students unable to care for

themselves to the extent that an "affirmative duty to protect that individual arises," the court nevertheless ruled that plaintiffs should be allowed to amend their complaint to allege that the school was deliberately indifferent to the safety of students because school policies "encourag[ed] a climate to flourish where innocent [children] were victimized." *See also Gates v. Unified School Dist. No. 449*, 996 F.2d 1035 (10th Cir. 1993); *Thelma D. v. Board of Educ.*, 934 F.2d 929 (8th Cir. 1991); *Jane Doe A. v. Special Sch. District*, 901 F.2d 642 (8th Cir. 1990).

The standard has also been employed or cited with approval in cases involving assaults upon students by other students. The court below cites *Lopez v. Houston*, 817 F.2d 351 (5th Cir. 1987), in which the Fifth Circuit held that, although there was no evidence that the school district's training program was sufficiently lacking to rise to the level of "deliberate indifference," a

school bus driver could be held liable for his failure to protect the plaintiff from attacks by other students on the school bus if he was "grossly negligent or deliberately indifferent." Similarly, in *Pagano v. Massapequa Public Schools*, 714 F.Supp. 641 (E.D. N.Y. 1989), the court held that the school district's failure to take preventive steps to protect a student from verbal and physical abuse by other students rose to the level of "deliberate indifference." And in *Williams v. City of Boston*, 784 F.2d 430 (1st Cir. 1986), the court held that in order to prevail against school officials, a student who was shot at a high school football game must show that the school officials were "deliberately indifferent" in failing to establish a custom or policy of adequate security at school events. In *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992), *cert. denied* 113 S.Ct. 1266 (1993), the court refused to conclude that compulsory attendance

laws give rise to a constitutional duty with regard to a teacher's duty to protect a student who strangled in an unattended cloakroom adjacent to the teacher's classroom, but the court implied that there might be an independent basis for liability against the principal and superintendent under the *Stoneking II* "deliberate indifference" standard. In *Dorothy J. v. Little Rock School Dist.*, the court cited to the "deliberate indifference" standard in the panel decision in this case and stated that "no such pattern is alleged in this case." 7 F.3d 729, 732 n.2 (8th Cir. 1993).

Neither the Fifth Circuit nor any of the other courts which have applied the "deliberate indifference" standard to schools have offered an explanation as to how they made the exponential leap from this Court's decisions concerning the duty to provide medical care to prisoners and detainees, to

the non-criminal context. Certainly, this Court has never made that leap.

The Court had occasion to rule directly on this question in *Youngberg v. Romeo, supra.* In that case the Court ruled that although the state owes a duty to incarcerated mental patients to provide safe conditions, the trial court erred in its use of the "deliberate indifference" standard in its instruction to the jury.

> The "deliberate indifference" standard was adopted by this Court in *Estelle v. Gamble*, [citations omitted], a case dealing with prisoners' rights to punishment that is not "cruel and unusual" under the Eighth Amendment. Although the District Court did not refer to *Estelle v. Gamble* in charging the jury, it erroneously used the deliberate indifference standard articulated in that case.

457 U.S. at 312, n. 11.

In *City of Canton v. Harris, supra*, this Court expanded the "deliberate indifference" standard to include inadequate training of police officers and lower courts are now

misapplying *City of Canton* and other Section 1983 cases to hold school districts liable for tortious acts of employees.

The Fifth Circuit's ruling leaves open the door to lawsuits making a "federal case" out of any injury in the schools, from assaults by students on students or employees; injuries resulting from defective equipment (athletic, shop, etc.) or defective facilities; or injuries allegedly resulting from inadequate supervision. Any state tort action can thus be transformed into a constitutional case. Even in cases involving incarcerated prisoners, this Court has held that the due process clause is not implicated by mere negligence of a public official.

> Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth amendment would trivialize the centuries-old principle of due process of law.

Daniels v. Williams, 474 U.S. 327, 332 (1986).

If, indeed, there is a substantive due process right to bodily integrity, that does not legitimize the ruling of the court below or, indeed, the rulings of most of the lower courts on this subject. In order to violate the constitutional right it would seem that the state would have to knowingly place a child in an unsafe environment from which the student cannot extricate himself.

II. The Fifth Circuit's opinion unnecessarily expands substantive due process since students' liberty rights to bodily integrity are already adequately protected through state tort law.

Most states have statutorily waived the immunity of school districts from suit for the grossly negligent acts of public employees resulting in physical injury to students. Individual school employees probably would not be immune from liability if sued in their individual capacity even in those states where sovereign immunity has not been waived.

In the event that a case arises where the state does not permit a cause of action for gross negligence of a public official which implicates a student's liberty interest in bodily integrity, this Court can assess whether the reasons for not providing a remedy are rational for purposes of procedural due process. But that is not a valid reason for converting the liberty interest into a substantive due process right.

III. The Fifth Circuit ruling involves an issue that requires clarification from this Court.

A. The decisions of five circuits that have ruled on the issue of liability of school districts and school officials for bodily injuries to students have created a disarray of constitutional analysis that can only be resolved by this Court.

As the foregoing discussion demonstrates the substantive due process issue raised in these cases is very complex, and many lower courts do not even attempt to develop a cogent analytical base for their decisions, making it difficult for schools and their counsel to

follow the cases in developing a legal defense. Despite this Court's hesitance in finding new substantive due process rights, these courts use substantive due process as a constitutional "catch all" to hold schools liable under Section 1983 for injuries to students which do not fall neatly into explicit constitutional niches. In so doing, lower courts are expanding beyond their bounds this Court's rulings in *Ingraham v. Wright*, 430 U.S. 651 (1977), *Estelle v. Gamble*, 429 U.S. 97 (1976), *Youngberg v. Romeo*, 457 U.S. 307 (1982), *DeShaney v. Winnebago*, 489 U.S. 189 (1989), and *Rochin v. California*, 342 U.S. 165 (1952), to make schools strictly liable for injuries to students. Only this Court can settle the scope of these rulings and their applicability to such cases.

CONCLUSION

The holding below is a substantial departure from the decisions of this Court which are cited in its support. School

districts and school administrators and their attorneys across the country need guidance from this Court on these important issues.

Amici urge this Court to review this case.

Respectfully submitted,

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